

BEFORE THE SECRETARY OF AGRICULTURE

Milk in the Upper Midwest Marketing Area

Docket No. AO-361-A39, DA-04-03

BREIF OF RICHARD J. LAMERS ) TO AMMEND ORDER 30 IN FAVOR  
 LAMERS DAIRY, INC. ) OF THE AMAA AS WRITTEN  
 APPLETON, WI 54915 )

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THE PURPOSE OF THE ORDERS UNDER THE AMA ACT

1. To assure the consuming public of an adequate supply of fresh fluid milk.
2. To protect producers and consumers by arriving at a level of pricing not to exceed the level of parity.
3. To Administer the Orders fairly and equitably.
4. To provide orderly marketing in the Administration of the Orders

**Disorderly Marketing, unfair methods of competition and non-compliance with the declared policy of the ACT.**

DR. ED JESSE, representing himself and acknowledged as an expert witness submitted a sixteen page document entitled "Marketing and Policy Briefing Paper, No. 85 dated June 2004, marked as Exhibit 27. Cross of Dr. Jesse, page 318, line 7 thru 16. Q. "You state in one of your conclusions on page 16 that "A major objective of Federal Order(s) is to assure orderly marketing. The unrestricted ability to pool and depool milk on a monthly bases causing wildly fluctuating PPD's does not fit any definition of orderly marketing. Handlers are not treated equally, the producers do not receive uniform prices.." Now, this is part of your expert opinion and the facts as you see them?

A, Yes it is.

*(Comment.) This is evidence of the abuse of Federal Orders.*

Cross of JIM HAHN by Mr. English, page 127, and line 24 thru page 129 line 19.

Summary – De-pooling causes disruption in the market place, Land O'Lakes takes advantage of de-pooling when it is to their advantage, de-pooling benefits those who are attached to milk that is de-pooled, de-pooling has no social benefit and it does not create uniform pricing.

Examination by Lamers, page 131 thru 132 line 7, Q: Jim, you referred to, in your testimony, the inordinate reserve supply associated with Order 30, and can you elaborate on that?

A. Well, certainly, Dick. In a typical month when all the milk, or virtually all milk is being pooled, we have about, probably about 18 percent Class I utilization, between 16 and 20, depending on the month. 350 million pounds of Class I were pooling – the Market Administrator, through his staff, is pooling probably 1.9 billion pounds of milk. That's much more than what would be needed to service the fluid market and carry an adequate reserve in meeting that requirement. I can remember when in the Chicago Regional Order, we had about 240 million pounds of (Class I) milk a month, and the total pool was 600 million.

Q. And this brings us to the next question, then, Jim. What is considered an adequate reserve for the Class I market, what percentage of the Class I market?

A. It depends on the market and variation on a seasonal basis, that type of thing, but I would say between 25 and 40 percent would be an adequate reserve in most cases.

Q. Are you familiar with Dr. Roland Bartlett's paper on marketing facts in 1967 where he spelled it out at 20 percent/

A. I don't recall that but I'll accept that.

*(Comment.) There is unnecessary reserve amounting to 400 percent. This is evidence of unfair methods of competition, disorderly marketing and of use of Orders for subsidization to manufacturers as opposed to simply supplying the fluid market.*

Testimony of ADRIAN PEHLER of Swiss Valley Farms. Page 150 et al. Summary – Swiss Valley de-pooled all of the milk they could. They qualified milk for other handlers and received an undisclosed pooling fee, somewhere under a quarter (per cwt). Page 168

– They had to take out funds from other operations to compensate for meeting the mail box price on producer milk because it was not available from their Class I operations. Class III operations could pay a higher price by de-pooling while Class I could not..  
*(Comment.) This is a result of inequitable treatment.*

A plant that pools with CMPC pays a 16-cent fee for not having to ship milk while being qualified for pool.

*Note this constitutes extortion for the favor receiving money from the pool for milk which are unnecessary reserves..*

Testimony of KEITH PAGEL of Cass-Clay Creamery, Inc. at page 187 thru 190.

Summary. He qualified milk from Idaho so as to receive revenues so as to be competitive in the market place and offset the negative PPDs.

*(Comment.) This is evidence of unfair methods of competition by receiving kick-backs, and disorderly marketing.*

Testimony of BILL AVERBACK for Dairy Farmers of America with Cross by Mr.

Vetne: Page 200 to page 204. Summary, DFA will de-pool wherever and whenever they can when it is advantages to their cooperative.

*(Comment.) This is evidence of unfair methods of competition, and disorderly marketing.*

Testimony of ELVIN HOLLON for Dairy Farmers of America. Page 260, line 25 to 261, line 10. “We note that nearly all participants in the hearing support tightening the performance standards for distant milk and most support an elimination or reduction in the ability to de-pool. We also note for the record that we participate in both activities in an effort to have sufficient revenue streams to pay our members’ milk prices equivalent to that of our competitors. While we feel that both practices need to be corrected in some way, we cannot disregard day-to-day impact of the revenue stream in our business operations.”

A discussion ensues regarding the pooling of milk from Idaho under the minimum performance standards presently required by Order 30.

*(Comment.) In the past, this was referred to as "pool riding" and was discouraged.*

Pages 283 and 284, DFA had discussions with the Market Administrators Office about what would be heard and what would not be heard.<sup>1</sup>

*(Comment.) This is evidence of unfair methods of competition, and disorderly marketing.*

Testimony of DENNIS TONAK of Mid-West Dairymen's Company, page 325, lines 3 thru 6. **"Among the basic purposes of the Federal Order structure are to assure an adequate supply of milk for the fluid market, equitably share the pool proceeds in an economically justifiable manner, and promote orderly marketing."**

Page 342, line 10 to 18. "Mid-West is familiar with the pooling of Idaho milk and has pooled some Idaho milk for approximately three years. In a typical arrangement, the milk in Idaho pays a fee for pooling. This fee may range from a certain portion of the pool draw to percentage of the Class III, such as 1 or 2 percent, or it may be a set per hundredweight fee such as 10 or 15 cents. Pooling fees have become a significant revenue stream for some Order 30 handlers."

Page 343, line 7 thru 10. "The pooling fees are not shared uniformly across the market. They are not part of a market wide pool, but are retained by the individual handler".

Line 16 thru page 344 line 1. "In Mid-West's case, and we expect with others, the benefit gained from pooling the Idaho milk is used in three interrelated ways, it helps offset the cost of supplying the fluid market, it helps make up the negative PPD's, and it helps the financial returns to our producer-members either directly on pay price or as a source of earnings. Mid-West does not particularly like the pooling of Idaho milk, but if we didn't do it, someone else would. We also see it as a method of business survival in a very competitive marketplace."

*(Comment.) This is evidence of unfair methods of competition, and disorderly marketing.*

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<sup>1</sup> Is this collusion for the purpose of further promoting monopolies?

Page 351 line 22-23. "The purpose of pooling is to share revenue."

Page 355 line 8 thru page 356 line 12. "We have already heard from producers who are impacted by the decisions to pool or not pool. The producer doesn't make these pooling decisions. Handlers make the decision when they fill out the report of receipts and utilization. If milk is reported, it is pooled provided, of course, that it met the once-and-done touch base. If it isn't reported, it isn't pooled. This sounds a lot like paper pooling. It also creates inequity among handlers. When there are negative PPD's, and the associated Class III depooling, it is very difficult for those supplying the Class I in Order 30 to compete with cheese plants.

*(Comment.) This is evidence of unfair methods of competition, and disorderly marketing and inequitable treatment of handlers..*

In April 2004, Mid-West made up the \$4.11 negative PPD and paid a zero PPD. We did it with the pooling fees we received from pooling Idaho milk. Not everyone has that income stream. One cooperative that supplies fluid plants and Class II and Class III markets did not pay a negative PPD, but reduced component prices below Federal Order values. At the same time there were individual cheese plants that apparently depooled since they paid positive PPD's in the 40 to 60 cent range.

There is not any way to recover the negative PPD's from the Federal Order. A handler that must pool is always at a disadvantage when there's a negative PPD, and when there's a positive PPD, the handler who depooled during the negative PPD immediately returns to share in the pool."

Page 356 line 25 to page 357, line 7. "The fluid plant cannot always recover this increased cost from the marketplace. Many of the longer-term packaged milk supply arrangements with national and regional accounts have a price adjuster for changes in the Federal Order cost of the milk. There may not be any provisions, however, for changes in over-order prices. The fluid plant ends up eating this increase, and the books show red ink."

*(Comment.) This is evidence of unfair methods of competition, and disorderly marketing and inequitable treatment of handlers. This also forces the "red ink Class I handlers" out of business thereby furthering the cause in the creation of monopolies.*

Page 364, line 3 – 11. "Additionally, the record shows that there are local milk that shares in the market wide pool on an opportunistic basis. This milk detracts from the prices received by those who regularly and continually serve the needs of the Order 30 market, both when it pools and when it doesn't pool. Inequity among producers and handlers is apparent due to changes in pooling of the local milk. There has also been chaos in the marketplace."

Page 369 cross by Beshore. Summary: At 10 cents per cwt, pooling fees from Idaho would be over \$3million per year. This would be available to some organizations and not to others.

*(Comment.) This is evidence of unfair methods of competition, and disorderly marketing and inequitable treatment of handlers.*

Page 411 to 415 cross by Lamers. Summary: Manufacturing handlers want to share Class I monies from the pool but they do not want to share Class III monies. Pool monies are paid to handlers and not directly to producers. Artificially high Class I prices reduce consumption of fluid milk. Supply demand in the cheese market sets the level of milk prices.

Testimony of NEIL GULDEN representing Associated Milk Producers Co-op, cross by Lamers pages 737 to 739. Summary: the differential of \$1.80 is legally set artificially high and its intent is to subsidize manufacturers.

*(Comment.) It is our opinion the Class I differential at \$1.80 violates the Act Section 2 (2) in that it does not protect the consumer.*

Testimony of MARY KEOUGH LEDMAN testifying on behalf of Dean Foods, Page 627 line 13 – 21, "In conclusion, it is my opinion that the Federal Order pricing and

pooling practices failed to ensure that milk flows to the highest value use. The liberal pooling regulations promote disorderly marketing and provide free-riders the opportunity to play the system. Meanwhile, consumers of fluid milk, who live in what is referred to as a surplus milk area, pay some of the highest retail prices for milk in the United States."

Cross by Ms. Yoviene, Page 661 line 25 to page 664 line 25. The discussion centered on over order premiums in Order 30 and then Page 665 line 1 - 19.

"Q. I think that in your discussions on cross-examination there was some discussion that Class III values out in the marketplace were able to give Class III processors the ability to pay the significantly higher Class III prices that were existing in the market. Do you remember having a discussion about that, or would you agree with that?

A. My recollection of the discussion is that Class III manufacturers could pay more than the Class III price when the same market was going up, because the Class II price, for example, was determined from the NASS prices that were two or three weeks old.

Q. And did Class I processors have that same value increase in their end products?

A. No.

Q. To allow them to increase their over-order premiums like they were forced to do?

A. No.

*(Comment.) This is evidence of unfair methods of competition, and disorderly marketing.*

Testimony of PAUL KYBURZ, Market Administrator of Order 30, Cross by Lamers Page 713 line 20 to page 714 line 6.

Q. I have a follow-up question to that Paul, if you don't mind. Do you ever really have any producers as such that ask to qualify for pooling or is it not the handler that will qualify the producer?

A. Generally, it's the handlers that would qualify the producers, Yes.

Q. Yes, and so that basically being as how it is the pool funds that go to the handler directly, who controls whether or not that milk is pooled or not pooled, and if their producer is pooled or not pooled, the handler controls that situation, does he not?

A. That's generally true, yes.

**Affects of De-Pooling.**

Exhibit 6, Table S-1, prepared by the Market Administrators office shows an estimated milk depooled in 2003 of 6,774,000,000 pounds and for six months of 2004 is 4,848,000,000 pounds.

Exhibit 11, Table 3 prepared by the Market administrators office shows the Producer Price Differential vs Estimated by Including all eligible Producer milk For the year 2003 the Actual was (\$0.05) and the Estimated was \$0.19. The difference is \$0.24. For the six months of 2004, the actual PPD was (\$0.79) and the estimated is (\$0.07) of a difference of \$0.72.

Using the volume of milk pooled for the year 2000 of 23,414,521,759 pounds and if the same volume was pooled in 2003 and one-half of that volume was pooled in the six months of 2004, this equates to \$561,948,292.22 manufacturing handlers withheld from the pool in 2003 and \$84,292,278.33 for the six months of 2004. These handlers had these funds to use for unfair competition for producer milk and producers in the market did not receive a uniform price.

**Prohibit unfair methods of competition.**

Testimony of SUE BEITLICH, Wisconsin Farmers Union, page 96, line 6 thru 15, "Finally, I would urge the USDA to review – in reviewing the testimony for this hearing , to strictly follow the law. Specifically, I'm referring to the amended AMAA of 1937, Section 608c(7), which lays out the policies for the USDA to follow in administering Federal Milk Orders. This specific section directs USDA to, quote, Prohibit unfair methods of competition and unfair trade practices in the handling thereof, end quote."

Testimony of PAUL ROZWADOWSKI, National Family Farm Coalition, page 111, line 23 thru 11. page 112 line 11. "Although we have lost huge numbers of farms and huge numbers of processors, the Upper Midwest still has the greatest competition for milk in the nation. This is coincidental to Federal Milk Orders, not the result of Federal Milk

Orders. Looking at other parts of the country, it appears that the 1938 Agricultural Act 608(c)(7)(a), which states; "Prohibition unfair methods of competition and unfair trade practices" was forgotten as soon as it was written. All of the issues regarding pooling and most of the problems in dairy could be solved by rigorous enforcement of that section."

### **THE LAW UNDER THE "ACT"**

7 U.S.C. 608c, Section 2 (2) to protect the interest of the consumer by (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

#### **The AMAA Section (5) Terms-Milk and its products.**

**(B) Providing (ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered irrespective of the uses made of such milk by the individual handler to whom it is delivered.**

### DISCUSSION.

The reading of this statute can only apply an interpretation as it is stated. This statute authorizes the market-wide pool and operation thereof. The language clearly states payment to all producers delivering milk to all handlers of uniform prices for all milk so delivered irrespective of the uses made of such milk by the individual handler.

Federal milk marketing orders address only Grade "A" milk in a defined area. This means that all such milk in that area is subject to the provisions of this statute. As such, the USDA cannot allow the depooling of milk at any time. The statute applies to **all milk irrespective of use.**

If a handler depools producer milk, this means that Class I fluid market does not need it and it must be permanently eliminated from the pool.

If any depooling is allowed, even on a temporary basis for any handler, it must then be allowed also for Class I handlers. The only way depooling could be legally allowed is under Section (5)(B)(i) which is an individual handler pool.

Both Lamers Dairy, Inc. and Deans Foods proposed the INDIVIDUAL HANDLER POOL as a way to preserve the system and solve the problems inherent to the abuse of discretion and invidious discrimination under Order 30. Both of the proposals were denied for hearing. In our opinion, an individual handler pool could solve the problems. The market would not be inequitable because there would be no extortion of pooling fees for favoring pool draws. The testimony presented of the present condition of milk marketing under Order 30, is proof that the elimination of the individual handler pools is a mistake.

If the cooperatives do not want the individual handler pools, this is an indication that Federal Milk Marketing Orders are no longer needed.

## CONCLUSION

While some of the proposals curtail or disallow pool-riding of distant milk, they do not curtail the extortion of pooling fees for the favor of qualifying milk of handlers who wish to draw money from the producer settlement fund. This is not possible for all handlers on an equitable basis. Pooling fees are not shared as among handlers.

Depooling is an unfair method of competition. In the alternative to individual handler pooling, we would support proposal 3 that does limit depooling but does not eliminate it. Under this scenario, pooling fees (kickbacks) would continue to be a major source of income for those who are in a position to qualify milk that would not depool under proposal 3. During times of price inversion with depooling allowed, there would still be

inequities as among handlers and producers . Under the individual handler pool, normal supply contracts and free market competition would take care of the problem.

The Secretary must enforce the AMAA 608c Section 5(i)(ii), and also include Section (7)(a) the prohibition of unfair methods of competition and unfair trade practices under the Orders.

If these sections are not enforced, the Secretary must then terminate the Orders under Termination of Orders, Section (16), as Order 30 does not provide orderly marketing, handlers are not treated equally and producers do not receive a uniform price. The order does not conform to the declared policy of the Act. Producer milk prices are supported under the Price Support System.

Respectfully Submitted this 12 day of October, 2004



Richard J. Lamers,  
Lamers Dairy, Inc.