

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

2006 AMA Docket No. M-4-1

In re: LANCO DAIRY FARMS COOPERATIVE,
Petitioner

DECISION AND ORDER

Introduction

In this action, the Petitioner Lanco Dairy Farms Cooperative (“Lanco”) seeks review of the Market Administrator’s (“MA”) interpretation and application of 7 C.F.R. §1001.13(b), contending that the MA has misconstrued, misapplied, or abused his discretion by: (1) giving one meaning to the term “reporting unit” as used in 7 C.F.R. §1001.7(c)(3) and §1001.13(b)(1), and another meaning to the term “reporting unit” in §1001.13(b)(2); and (2) adopting a construction of §1001(b)(2) that was not noticed or considered in any rulemaking proceeding, nor supported by any rulemaking decision.

The Respondent Administrator, Agricultural Marketing Service (“AMS”): (1) denied generally the material allegations of the Petition; (2) asserted that the Petition failed to state a claim upon which relief can be granted, and; (3) affirmatively stated that the Agricultural Marketing Act of 1937, as amended, and the milk marketing orders, as interpreted by the MA, are fully in accordance with law and binding upon the Petitioner.

An oral hearing was held on September 26, 2006 in Washington, D.C. The Petitioner was represented by John H. Vetne, Esquire of Raymond, New Hampshire and the Respondent was represented by Sharlene Deskins, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C. Both parties have submitted proposed Findings of Fact, Conclusions of Law and Briefs in support of their respective positions and the matter is ripe for disposition.

Discussion

The Northeast marketing area is defined in 7 C.F.R. § 1001.2 and includes all of the territory within the bounds of the states of Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont, and the District of Columbia, as well as all counties in Maryland except Allegheny and Garrett, all of the counties and townships in New York except those specifically excepted, and specified counties in Pennsylvania and Virginia.

Lanco was formed in 1998 with 30 members¹ (Tr. 13) and is a [Capper-Volstead]² “cooperative association” within the meaning of 7 C.F.R. §1000.8 of the General Rules applicable to Federal Milk Marketing Orders. The Petitioner has been a “handler” as defined in 7 C.F.R. §1001.9(c) since prior to January 1, 2000. *Id.* Lanco’s primary customers for its members’ Class I milk³ historically have been four bottling pool plants⁴ located in Maryland, Delaware, Pennsylvania and New Jersey, each of which have their own independent suppliers. Their purchases of Lanco’s milk are seasonal, in effect making Lanco a supplemental and balancing supplier for those plants. Lanco also sells

¹ Testimony provided at the hearing on November 14, 2006 indicates that Lanco has grown significantly and currently has 825 farm members. Tr. 15.

² See 7 U.S.C. § 291 et seq.

³ Class I milk is defined in 7 C.F.R. § 1001.40(a) and generally refers to consumer fluid milk products.

⁴ See “pool plant” definition below.

milk which is not sold for Class I consumption to Saputo Cheese. Any additional milk, with the exception of some small customers, was delivered to the Laurel, Maryland pool plant. (Tr. 17-18). Pooling entitles Lanco's farmer members to receive the same "blend price" as other producers supplying milk to the market, but in order for them to do so, it is necessary for the milk sold by Lanco to qualify for the market-wide revenue pool as "producer milk" under the marketing order. Qualification for the "blend price" requires that specified percentages of milk which vary by season be included in the pool and limits the amount of milk that can be diverted to nonpool plants. Up until June of 2005, Lanco had shipped sufficient quantities of milk to qualify for inclusion in the pool for the Northeast Order.

Effective June 1, 2005, the Northeast Milk Order was amended⁵ by reducing the volume of producer milk eligible for diversion in § 1001.13, and increasing supply plant shipment requirements in § 1001.7.

7 C.F.R. § 1001.13(b) specifies that the milk received by a handler must satisfy the shipping standards specified for a supply plant. It provides:

Producer milk means the . . . milk . . .

(b) Received by the operator of a pool plant or a handler described in §1000.9(c) in excess of the quantity delivered to pool plants subject to the following conditions:

- (1) The producers whose farms are outside of the states included in the marketing area and outside the states of Maine or West Virginia shall be organized into state units and each such unit shall be reported separately; and
- (2) For pooling purposes, each reporting unit must satisfy the shipping standards specified for a supply plant pursuant to §1001.7(c);

7 C.F.R. § 1001.7(c) contains the shipping standards for supply plants:

Pool plant means . . .

⁵ See also, *White Eagle Cooperative Association, et al. v. USDA*, 396 F. Supp. 2d 954, 64 Agric. Dec. 1227 (2005)

(c) A supply plant from which fluid milk products are transferred or diverted to plants described in paragraph (a) or (b) of this section subject to the additional conditions described in this paragraph. In the case of a supply plant operated by a cooperative association handler described in §1000.9(c), fluid milk products that the cooperative delivers to pool plants directly from producers' farms shall be treated as if transferred from the cooperative association's plant for the purpose of meeting the shipping requirements of this paragraph.

(1) In each of the months of January through August and December, such shipments and transfers to distributing plants must not equal less than 10 percent of the total quantity of milk (except the milk of a producer described in §1001.12(b)) that is received at the plant or diverted from it pursuant to §1001.13 during the month;

(2) In each of the months of September through November, such shipments and transfers to distributing plants must equal not less than 20 percent of the total quantity of milk (except the milk of a producer described in §1001.12(b)) that is received at the plant or diverted from it pursuant to §1001.13 during the month;

The above amendments were the result of a multi-day, rulemaking hearing which considered a number of amendments regarding the quantity of milk that must be delivered or transferred to a distributing plant in order for the milk to be included in the pool. A final decision issued on January 31, 2005 containing the above changes (*70 Fed Reg.* 4932) became effective after receiving a favorable vote by at least two thirds of the producers engaged in the production of milk for sale in the marketing area. *70 Fed Reg.* at 18962 (April 12, 2005).

In early July of 2005, Lanco was notified that it had failed to meet the pooling percentage requirements because its deliveries to the Laurel, Maryland pool plant during the month of June were not considered as being qualifying deliveries for meeting pool eligibility requirements.⁶ Lanco was advised that while no penalty would be exacted for June, the eligibility requirements would be enforced for July. Tr. 20-21.

⁶ It is primarily this loss of qualification that has required Lanco to alter the way it does business. While the Laurel, Maryland plant is a pool supply plant, it is not a pool distributing plant as the Market Administrator

After being informed of the MA's position, John Vetne, Lanco's counsel submitted a memorandum to the MA and requested reconsideration, explaining the hardship that fulfilling the requirements of the "new" interpretation would cause. (Attachment A to Petition; PE 1). By letter dated July 15, 2005, the MA reaffirmed his position and rejected Lanco's request. (Attachment B to Petition, PE 2). Lanco then sought review by the AMS Dairy Programs Administrator requesting that the Market Administrator's interpretation be overruled. The Market Administrator's interpretation was affirmed in an undated letter from the AMS Dairy Programs Acting Deputy Administrator John Mengel. (Attachment C to Petition; PE 3). During the month of July, Lanco also met with and unsuccessfully pleaded their case with Dairy Programs personnel, including Dana Coale, the Administrator, John Mengel, Gino Tosi and an individual believed to be Dave Jamison. Tr. 25.

In order to continue to qualify for the revenue sharing from pooling, Lanco initially made arrangements to meet the pooling requirements by purchasing milk from the independent suppliers to the four bottling plants, delivering Lanco milk to the bottling plant and delivering the same amount of the purchased independent supplier's milk to Saputo Cheese. Thereafter, Lanco entered into a contractual agreement with Maryland-Virginia Milk Producers ("MVMP"), another cooperative which exacted a pooling accommodation fee of .05 cents per hundred weight of fluid milk on member volume to divert Lanco's milk to one of MVMP's Class I customers to allow Lanco to meet the pool qualification requirements. (Tr. 32-33). Thus, Lanco's cost of qualification includes both the accommodation fee as well as the increased cost of milk transportation.

has determined is required by the regulations for qualification. This distinction is determinative of the outcome of the case.

Lanco maintains that in order to comply with the MA's "interpretive" requirements regarding pool plant percentages requirements, it has had to incur additional costs of \$26,000.00 to \$30,000.00 per month in transportation and pooling accommodation fees in order to market its members' milk. Tr. 35.

Although the locations of every one of Lanco's farmer members were not specifically identified, Lanco indicates that it has not received any producer milk from dairy farms outside the states included in the Northeast marketing area or outside the states of Maine or West Virginia and specifically did not receive any such outside milk during June of 2005.

Having considered all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order are entered.

Findings of Fact

1. Lanco Dairy Farms Cooperative is a non-profit dairy farmer cooperative association with members in Pennsylvania, Maryland, and West Virginia that markets the raw milk of its producer members to milk plants in the Northeast marketing area, and is a "small entity" within the meaning of the Regulatory Flexibility Act. It is a [Capper-Volstead] "cooperative association" and has been a "handler" since prior to January 1, 2000.

2. In order for Lanco's farmer members to receive the same "blend price" as other producers supplying milk to the market, it is necessary that the milk sold by Lanco qualify for the market-wide revenue pool as "producer milk" under section 13 of the Northeast Milk Marketing Order, 7 C.F.R. § 1001.13.

3. Prior to the month of June of 2005, the milk sold by Lanco qualified for revenue sharing purposes as “producer milk” and its members received the same “blend price” as other producers supplying milk to the market.

4. As a result of a multi-day, rulemaking hearing conducted in September of 2002 during which interested parties were afforded the opportunity to submit comments evidence and post hearing briefs, a recommended decision was published by AMS in the Federal Register⁷ which was followed by a referendum favorably voted on by the regulated parties, the Northeast Milk Marketing Order was amended, effective June 1, 2005.

5. In July of 2005, the MA informed Lanco that it had failed to qualify for revenue sharing purposes for the month of June of 2005 as it had failed to meet the performance standards for pooling by delivering the required percentage of milk to a pool distributing plant,⁸ as was required by the amendment of the Northeast Milk Marketing Order, but that the requirement would be waived for June of 2005, but not for subsequent months.

6. In order to meet the post-amendment performance standards, Lanco has incurred additional monthly expenses of \$26,000.00 to \$30,000.00 in additional transportation costs and pooling accommodation fees, from July of 2005 up until the date of the hearing on November 14, 2006.

⁷ 70 *Fed Reg.* 4932 (January 31, 2005).

⁸ Prior to June of 2005, Lanco had qualified by delivering the required percentages of milk to the Laurel, Maryland pool supply plant. Under the Market Administrator’s interpretation of the amendment, after June 1, 2005, only deliveries of milk to pool distributing plants would qualify to meet the performance standards.

Conclusions of Law

1. 7 C.F.R. § 1001.13(b)(2) incorporates by reference 7 C.F.R. § 1001.7(c) in requiring 7 C.F.R. § 1000.9(c) cooperatives to comply with pool supply plant shipping standards to distributing plants (which vary from 10% to 20% depending upon the month).
2. “Reporting units” as defined in 7 C.F.R. § 1001.13(b) must satisfy the performance standards contained in Section 1001.7(c) in order for to have milk from that reporting unit included in the pool for the Northeast Milk Marketing Order.
3. The Market Administrator’s interpretation of the performance requirements contained in the Northeast Milk Marketing Order is consistent with the language of the Regulations and as such is in accordance with law.

Order

For the above reasons, the Petition is **DISMISSED**.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.
January 11, 2007

PETER M. DAVENPORT
Administrative Law Judge

Copies to: John H. Vetne, Esquire
Sharlene Deskins, Esquire

Hearing Clerk’s Office
U.S. Department of Agriculture
1400 Independence Avenue SW
Room 1031, South Building
Washington, D.C. 20250-9203
202-720-4443
Fax: 202-720-9776

