ASSEMBLY AGRICULTURE COMMITTEE MINUTES

MAY 13, 1975

MEMBERS PRESENT: Chairman Hickey
Vice Chairman Price
Mr. Jeffrey
Mr. Getto
Mr. Howard

MEMBERS ABSENT: Mr. Coulter
Dr. Robinson

GUESTS: John L. O'Harra, Board of Veterinary Medical Examiners
B. J. Lilly, Board of Veterinary Medicine Examiners
Roger A. Mauer, President, Clark County Veterinary Medicine Association
Elliott A. Sattler, Deputy Attorney General
Jack O. Walther, Practice Act Chairman, NSVA

In the absence of Chairman Hickey, Vice Chairman Price called the meeting to order. The purpose of the meeting was to hear testimony on SB 591, which makes various changes to statutory provisions regulating veterinarians.

Jack O. Walther, Chairman of the Practice Act Committee of the Nevada State Veterinary Association stated that they were in favor of this bill as it would revise their practice act. There are basically two parts to the bill. Primarily their interest is in revision and updating of the practice act and the new enforcement regulations.

Another part of the bill establishes the animal technican as a new entity. Many colleges are now offering a two year course and more schools will be offering it in the near future.

Dr. Walther explained that Senator Blakemore had introduced SB 342 which included much of the same material. Their bill (SB 591) had gotten hung up in the bill drafter and in the meantime SB 342 had gone on through the Senate. SB 342 is broader and they therefor ask that this committee approve SB 591 and let SB 342 go by the wayside.

Dr. B. J. Lilly stated that they have been trying to revise their practice act and this was a good step in that direction. He stated that they wish to protect the public and at the present time there is no teeth in this act to make compliance mandatory.

Mr. Price stated that he felt section 5, page 2, which deals with the Board not refusing to issue a license was actually in the reverse.

Mr. Sattler stated that it had been written in this manner in order to comply with APA where there are hearing procedures for refusal, denial or revocation. This language was used in order to coordinate

the bills. The Board may not refuse unless substantial evidence showing the applicant to be unqualified for the position.

Mr. Getto then asked if this bill would grandfather anyone who had been working under the vet for 5 years, and all the others coming into the field would have to have required education. Dr. Lilly stated that those grandfathered would be required to take an examination.

The Committee then went through the bill and discussed the various parts of it.

On page 1, line 8 it was decided to eliminate the whole line because it has been determined from the other bills in the session that it was necessary to specify age.

On page 2, line 3 it was determined that the word not had been omitted. It should read " for an examination to be certified as an animal technican who does not suc-".

Mr. Sattler stated that it was felt that if a person was qualifying for taking the exam by on the job training and did not pass the examination, the training was therefor not sufficient, and that applicant would have to be comply with the educational requirements in order to be re-examined.

Dr. Walther stated that this had been in the original document that had been submitted to the bill drafter and this had apparently been an typographical error which had not been caught until this time.

Mr. Getto asked about line 44 on page 2 which deals with causes for displinary action and is the claiming or inferring of professional superiority over other veterinary practitioners. He wanted to know if there were actually incidents of this type of thing. Mr. Sattler stated that they have had several cases of this and it was their desire to correct it.

On page 3, line 32, Mr. Sattler stated that this language was consistent with the language of Section 5 on page 2.

Mr. Howard suggested that on line 46, section 10, the words "relating to veterinary medicine" be added. The line would now read "of professional or techincal services relating to veterinary medicine."

On page 4, Mr. Price inquired why they were changing the number of members on the board from 5 to 6. Dr. Lilly stated that Dr. O'Harra has served as Secretary of the Board and as a voting member and in the past this has caused him some problems. They would like to keep him as Secretary of the Board on a nonvoting basis and add another member to take his place for voting.

Page 5, line 10 should be amended to leave the salary at $40. Dr. O'Harra explained that he felt this also had been a typographical error in that they are presently receiving $25 a day and would like to have this raised to $40. Mr. Price stated that the felt that they should stick with $40 since this seems to be the amount that the Assembly has been going along with. There were no objections to this.

Mr. Jeffrey commented that he questioned the advisability of not being allowed to serve two consecutive terms. Dr. Lilly explained that they have studied other boards and found that you often can get a so called "hard nose" on the board who has political power, who will end up running the board. They would like to keep this board clean and legal.

Dr. Walther stated that they also feel this new blood coming into the board with new and fresh ideas.

It was again suggested that line 44 which deals with age limits be deleted in keeping with the present trend.

Also, on line 49 of page 5 the words "and Canada" should be added since there were several schools in Canada which are recognized by them. Therefore the line should read "veterinary medicine within the United States and Canada, or, if the applicant is a"

On page 6, line 3, the word "Veterinary" should be added after the word American so the line will read "uates of the American Veterinary Medical Association

Also, on page 6, line 23 the term "examiners" should be changed to applicants" and the line will read "iners. All applicants shall be tested by a written examination which may".

Mr. Getto moved that the committee adopt these proposed amendments and that they be brought back to the committee for consideration. Mr. Howard seconded the motion. The vote was unanimous. Chairman Hickey stated that he would get the amendments drafted and then call a short meeting for the committee to see them and to take action of the bill as amended.

As there was no further business to conduct, Chairman Hickey adjourned the meeting and stated there would be no further regular meetings of this committee. Any additional meetings shall be at the call of the Chairman.

Respectfully submitted,

Sandra Gagnier,
Assembly Attache

Given to Ag Committee
Ned. State Leg.
By Dale G. Hunt

Exhibits to follow

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

IN RE:]	
]	DOCKET NO. AO-374-A3
PROPOSED AMENDMENTS TO THE]	
ORDER REGULATING THE HANDLING]	
OF MILK IN THE LAKE MEAD ORDER]	
MARKETING AREA, 7 CFR 1139]	

B R I E F

SUBMITTED BY:

ANDERSON DAIRY, INC.
BRUNO BIASI
DALE G. HUNT
GLENN H. JENSEN

ROBERT T. COCHRAN
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FOURTH FLOOR
226 THIRD AVENUE, NORTH
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JANUARY 15, 1975

UNITED STATES DEPARTMENT OF AGRICULTURE

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I

The Notice of Hearing

Pursuant to Notice published in the Federal Register of October 15, 1974 and October 22, 1974, a public hearing was conducted in Las Vegas, Nevada, December 10-12, 1974, to consider proposed amendments to the Lake Mead Milk Market Order, 7 CFR 1139.

II

General Statement

This Brief is respectfully submitted by Anderson Dairy, Inc. (in its capacity as the owner and operator of a milk producing herd), Bruno Biasi, Dale G. Hunt, and Glenn H. Jensen. All of said parties are operators of milk producing herds. They are "producers" under the Lake Mead Order, and their milk production is pooled as "producer milk" under the Lake Mead Order. Said parties are not members of Lake Mead Cooperative Association, or of Western General Dairies, or of any other cooperative association of milk producers. Said four parties will be referred to sometimes hereinafter as "said four nonmembers."

The record clearly shows that said four nonmembers, and members of Lake Mead Cooperative Association and Western General Dairies, constitute the regular source of producer milk supply to the Order 139 market.

Said four nonmembers submitted to the Secretary through the Secretary's proper representatives, proposals for the amendment of the Lake Mead Order; some of which were published in the Notice of Hearing and some of which were summarily denied without a hearing.

Said four nonmembers appeared at the hearing and submitted testimony and exhibits.

References will be made to testimony and exhibits appearing in the transcript. The reference Tr. p. 345 refers to testimony appearing at page 345 of the transcript; the reference Ex. 8 refers to Exhibit 8.

III

The background of the proposals for the amendment of Order 139 - the loading, flooding and pressure pooling of the Order 139 pool, the resultant damage to said four non-members, the corresponding unjust enrichment of those responsible for loading and flooding the pool.

The patent facts and those otherwise developed in this record clearly reveal that the Order 139 pool has been loaded and flooded with producer milk, not needed on the market, by the concert and combination of the proponent cooperatives, Lake Mead Cooperative and Western General Dairies; inconsistent with the intent of the Order as expressed in the promulgation decision, and to the severe prejudice and money damage to said four nonmembers.

Through said loading, flooding and pressure pooling on the Order 139 pool, the Class I utilization of the Order 139 producer milk was decreased from 80 percent Class I, when the Order first became operative in August 1973, to 50 percent Class I in June 1974.

Exhibit No. 24 shows that a reduction in blend Class I percentage from 72.89 percent to 49.15 percent results in a decrease in the Order 139 blend price of 72 cents per hundredweight.

Not only is such flooding and loading of the Order 139 pool severely damaging to said four nonmembers, but also, it does not accord with, and is in conflict with, the public interest considerations and objectives of the Act. The intent of the Act is to provide an adequate price to the producer for his milk production. It costs a producer so much to produce one hundred pounds of milk, whether that milk be used in Class I, Class II, or Class III. The primary source of money returns to producers is the Class I price applied to Class I milk. When the Class III portion is enlarged, the producer receives a lesser return in dollars per hundredweight for his milk production. At a 50 percent Class I utilization of producer milk; to restore one cent of the reduced blend price, it is required that a 2 cents per hundredweight increase be made in the Class I price (Exhibit 25). The Class I price is the price paid by the processor for milk going into the consumer packaged fluid products. If the money damage resulting to the producer from the excessive loading and flooding of the pool is to be recovered, it comes only through such increased Class I price to the Class I processor, who ultimately must pass the increase on to the consumer.

Clearly, said pressure pooling and the Order 139 provisions that make it possible and effective are not in the public interest.

From the limited information that was made available to said four nonmembers in their investigations preliminary to seeking relief through the hearing procedure, it appeared that it was probable that a large quantity of producer milk not regularly associated with Order 139 had been placed on the Order 139 pool as producer milk, particularly in the spring and summer months, and the bulk of this increase was likely placed on the Order 139 market during the "automatic pool qualification period" for supply pool plants under Order 139. This record shows that there is only one such Order 139 supply pool plant. Said plant is located at Minersville and is operated by Lake Mead Cooperative.

Calculations were then made, as developed in Exhibit 26, which show that the marketing of milk, from another Federal Order source, as producer milk under Order 139, would result in an unjust enrichment for such producer groups, who would so associate their milk from another Order to become producer milk under Order 139, in the exact amount of dollars lost by said four nonmembers as a result of such depression in the Order 139 blend price caused by the introduction of the large quantities of milk, from the other Order, as producer milk under Order 139.

The extent of money loss experienced by said four nonmembers prompted them to make the various proposals submitted to the Secretary's representatives to seek relief through Order amendatory action, and to bring to the Secretary such information as they could gather for this purpose.

The nonmember producers felt that the Secretary within the recent past having gone through proceedings involving anti-trust suits filed by the Department of Justice against cooperative associations who participated in similar pool loading and pressure pooling schemes and devices to damage and eliminate nonmember producers, would have an acute interest in these matters.

It was for the purpose of obtaining consideration on this record, and obtaining the appropriate amendatory relief, to foreclose such practices in the future, that the several proposals for Order amendment were submitted by said four non-members, and the requests were made to the Market Administrator for pertinent information in the files of the Market Administrator. However, several of the key proposals made by said four non-members for the amendment of the Order were denied by the Secretary without a hearing, and the Market Administrator refused to supply much of the key information sought.

The proposals made, the proposals summarily denied, the data requested and that obtained, and the responses of said four nonmembers in objection and exception to said denials and refusals, appear in Exhibits 7 through 22.

The information pertinent to thses matters that was refused to the four nonmembers, but which obviously is in the office and files of the Market Administrator, can,of course, be considered, in camera, by the Secretary, in arriving at a decision in these matters.

It is respectfully submitted that the record manifests an unwarranted degree of reluctance to make the pertinent information available to said four nonmembers; evidences an arbitrary, capricious and unlawful, summary denial, without a hearing, of the pertinent and apt Order amendments proposed by said four nonmembers; and demonstrates arbitrariness and capriciousness in preferred treatment to cooperative associations as compared to nonmember producers, contrary to the intent of Congress, in the administration and application of the Agricultural Marketing Agreement Act; and inconsistent with the spirit and intent of the Agricultural Fair Practices Act enacted by Congress.

IV

The error of the Secretary in summarily denying, without a hearing, certain proposals submitted by said four nonmembers for the amendment of the Order 139.

The first series of proposals were submitted by said four nonmembers under date of October 3, 1974, and are identified in the record in Exhibit 7. Under date of October 9, 1974, the Administrator summarily denied certain of said proposals submitted by said four nonmembers, without a hearing record having been made on said proposals. Said October 9, 1974 letter appears in Exhibit 8 in the transcript. Said summary action by the Administrator was taken with respect to Proposal No. 1; Proposal No. 2; and Proposal No. 3(b). Proposal No. 1 was a proposal to terminate the Order 139. Proposal No. 2 was to revise Order 139 to operate an individual handler pooling. Proposal No. 3(b) would eliminate from Order 139 any provision authorizing a supply pool plant.

Under date of October 14, 1974, said four nonmembers responded to Exhibit 8, protesting, objecting and excepting to said summary action of the Administrator. Said response appears in the transcript as Exhibit 10.

Clearly, on the basis of the evidence developed at the hearing, said proposals should have been considered at the hearing, and should have been adopted. Certainly, this record thoroughly and completely substantiates the position stated by said four nonmembers in Exhibit 10, that the denial of said proposals, without a hearing, was arbitrary and capricious, constituted a denial of due process to said four nonmembers, and was unlawful.

Under date of October 31, 1974, said four nonmembers submitted to the Associate Administrator additional proposals for consideration at the hearing. Said proposals appear in the transcript in Exhibit 11. Under date of November 15, 1974 the Associate Administrator summarily denied certain of said proposals without a hearing record having been made on said proposals. The proposals so summarily denied were Proposals 5(c) and 6 as appearing in Exhibit 11. Said November 15, 1974 action of the Market Administrator appears in Exhibit 12. The only basis offered by the Associate Administrator was the improper, strained, objection that said "Proposals 5(c) and 6 are in very general terms, and do not provide the specific amendatory language necessary for appropriate consideration of the proposals by all interested parties at the hearing."

In response,dated November 30, 1974, said four parties protested and excepted to the summary denial of said proposals. Said action by the Associate Administrator was arbitrary and capricious, denied due process to said four nonmembers, and was unlawful.

The arbitrariness and capriciousness of the Associate Administrator's actions in so denying said proposals 5(c) and 6 is evident from the publication in the Notice of Hearing of Proposal No. 10, by the cooperative associations, Lake Mead Cooperative Association and Western General Dairies, which clearly is in more general terms and more lacking in specific amendatory language than is alleged by the Associate Administrator with respect to said Proposals 5(c) and 6 submitted by said four parties.

This record clearly and conclusively demonstrates that milk has been loaded on the Order 139 pool in a gross fashion, intentionally and unnecessarily, to the gross damage, detriment and prejudice of said four nonmembers. This record clearly demonstrates that it was gross error for the Associate Administrator to summarily deny said Proposals 5(c) and 6.

It is respectfully submitted that the acceptance of Proposal No. 10 by the Associate Administrator, and its publication in the Notice of Hearing, and the summary denial of said proposals submitted by said four nonmembers, reflects an application of

different standards and methods of administration of the Act as practiced toward nonmember producers and toward cooperative associations that unfortunately has characterized this proceeding; for which there is no authority in the Act, and which runs directly counter to the obvious spirit and intent of the Act that all producers, whether nonmembers or cooperatives, shall be treated fairly and equally, without discrimination. Certainly the Congress that enacted the Agricultural Fair Practices Act, which provides penalties for discrimination between members and nonmembers, did not intend for the Secretary to administer the Agricultural Marketing Agreement Act so as to effect such discrimination, or to so aggrandize the cooperative associations at the cost, expense, detriment, damage and general prejudice to nonmember producers, such as said four nonmembers.

With particular reference to the proposals of said four nonmembers that were summarily denied, without a hearing; the evidence in this record calls for the termination of Order 1139; that if the Order is not terminated, the Order should be changed to individual handler pooling; that if the individual handler pooling is not adopted, supply pool plants should be eliminated from the Order; that such revisions of Sections 1139.12 and 1139.13 should be made as are appropriate to foreclose the loading of surplus milk from another Federal Order market on the Lake Mead Order 139 pool.

Any further discussion in this Brief is submitted without waiver of the position of said four nonmembers stated

above with respect to said summary denial of said proposals made by said four parties.

V

What is an adequate supply, including adequate reserve, of producer milk for the Order 139 market? The Order 139 market since the inception of the Order has been loaded and flooded with unneeded producer milk, to a greater or less degree, reaching its peak during the period of automatic pool qualification of a supply plant permitted by the supply pool plant definition.

In the promulgation decision of Order 139 the Assistant Secretary found that -

> "No butter, hard cheese, or nonfat dry milk is manufactured by the Southern Nevada plants or by the plant at Cedar City, Utah.
>
> Producers associated with this market (Order 139) are not expected to produce large quantities of milk in excess of the market's fluid need."
>
> (Tr. p. 233)

Throughout the administration of the Act, in providing, formulating and administering the Federal Orders, the Secretary has repeatedly stressed that the Order provisions should be such as to attract an adequate, but not an excessive supply of producer milk.

The witness for Lake Mead Cooperative testified that the Order 139 market should have producer milk equal to 10-15 percent in excess of the Class I; that this constitutes an adequate, ample supply of producer milk.

(Tr. p. 115)

On this basis, for every 100 pounds of Class I milk, there should be a producer milk supply of 115 pounds, which equates to 100/115 = 87 percent Class I.

Table IV in Exhibit 6 gives the producer milk percentage Class I as follows:

August 1973	80.51%
September 1973	82.89%
October 1973	79.94%
November 1973	77.15%
December 1973	81.72%
January 1974	79.39%
February 1974	72.89%
March 1974	62.98%
April 1974	60.81%
May 1974	57.13%
June 1974	50.01%
July 1974	52.89%
August 1974	65.35%
September 1974	66.57%
October 1974	65.47%

The Order 139 market was more than adequately supplied with producer milk, including adequate reserves, when the Order became effective in August 1973, with the Class I utilization of 80.51%.

Table IV, Exhibit 6, clearly shows that since August 1973 there has been a general, progressively increasing, unnecessary loading of the pool, month by month, being the heaviest during the March-July period of automatic pool qualification of the Minersville supply plant, reaching the absurdly low Class I classification range of 50-60 percent Class I during said period. The unnecessary loading of the Order 139 pool has continued after said period, although not as excessive, showing approximately 65 percent Class I for the months of August, September and October 1974, as compared to approximately 80 percent for the corresponding months in 1973.

VI

Lake Mead Cooperative Association, acting in concert and collaboration with Western General Dairies, have been responsible for the excessive loading of the Order 139 pool.

There was some intimation prior to the hearing that said four nonmembers were responsible for the excessive loading of the producer milk on the Order 139 pool. This is forcefully and conclusively answered in the negative by Exhibit 23. For example, Exhibit 23 shows that the producer milk represented by the four nonmembers increased 11.02 percent between the months of February 1974 and June 1974; while the other producer milk on the market, represented by the Lake Mead Cooperative and Western General Dairies, increased 48.84 percent between said months of February 1974 and June 1974.

VII

The principal present Order 139 provisionsthat permits the excessive loading of unneeded milk on the Order 139 pool.

The principal provisions of Order 139 that permit excessive loading of producer milk on the pool are the "distributing pool plant" provision at Section 1139.7(a)(1); the "supply pool plant" provision at 1139.7(b); and the "producer" and "producer milk" provisions, particularly the "diversion" provisions.

The Order 139 distributing pool plant provision, at Section 1139.7(a)(1), permits such a plant to remain a "pool plant" if it has Class I utilization of producer milk as low as 50 percent.

If there were no "supply pool plant" provisions in Order 139, the minimum marketwide Class I utilization possible would be 50 percent; presuming that the maximum amount of producer milk was associated with each distributing pool plant, by receipt and by diversion, to take the percentage Class I at each plant down to 50 percent, even though such plants actually had no need for such milk.

Under the present Order 139 provisions, the market can undergo extreme loading of surplus, unneeded, milk into the Order pool, by reason of the presence of the "supply pool plant" provision in the Order at Section 1139.7(b).

Under the Order 139 supply pool plant provision, for each of the months of August through February a supply plant may become a "pool plant" if as much as 50 percent of its dairy farmer Grade A milk receipts is transferred to pool distributing plants. If the distributing pool plants obtained all of the milk from supply plants, then on this basis, the Order 139 market could be loaded with surplus milk so as to carry the marketwide utilization down to 25 percent Class I. Under these circumstances, for every one hundred pounds of milk received at the distributing pool plant from the supply plant, there can be another one hundred pounds of producer milk associated with the supply plant, while only 50 pounds of the two hundred pounds of milk is used as Class I; resulting in a 25 percent Class I utilization of Order 139 milk. The present Order 139 supply pool plant provisions, so far discussed, permit the loading of the pool during the months of August through February to the extent of taking the producer milk Class I percentage down to 25 percent.

Also, by reason of the last two sentences in said supply pool plant Section 1139.7(b), which permits a supply plant to have automatic pool plant qualification during each of the months of March through July; there is no limit to the amount of the producer milk that may be loaded on the Order 139 pool during said five months, to cumulatively depress the Order 139 percentage Class I utilization. During said months of March through August, there is no limit to the total amount of producer milk that is received at such plant and is transferred to uses other than Class I, and there is no limit to the extent of use in other

than Class I of the milk diverted from said supply pool plant to another plant; and there is no requirement that one pound of such milk be transferred from such supply plant to, or remain actually associated with, distributing pool plants.

The extent to which diversion of producer milk from such plants treated as pool plants is permitted also serves to facilitate the excessive loading of milk on the pool by association with such pool plants as producer milk.

VIII

The appropriate revisions of the present Order 139 provisions that permit and facilitate the excessive loading of unneeded milk on the Order 139 pool.

To foreclose such loading of unneeded milk on the Order 139 pool as has been practiced under Order 139 since its conception, appropriate revision should be made in said Order provisions.

The present 50 percent Class I utilization requirement for distributing pool plant qualification should be increased to 60 percent (Proposal No. 2).

The provision in Order 139 for a supply pool plant should be eliminated. Section 1139.7(b) should be stricken from Order 139, in its entirety.

The 50 percent shipping requirements now specified in Section 139.7(b), for pool plant qualification of a supply plant, should be increased to 75 percent (Proposal No. 6).

The following provision in Section 1139.7(b) should be stricken -

> "Any supply plant that is qualified as a pool plant in each of the immediately preceding months of August through February shall be a pool plant in each of the following months of March through July unless written request for nonpool status for any such month is filed by the plant operator with the Market Administrator prior to the first day of any such month."

There should not be included in Order 39 any provision whereby a supply plant has pool plant status for any month by reason of transfers of milk from such supply plant to pool distributing plants during any preceding month or months (Proposal 6).

> If it is provided that a supply plant shall have such automatic pool plant status for any month or months; there should be incorporated within such provision the following proviso:
>
> "Provided, that notwithstanding any provision in this part (Lake Mead Order, 7 CFR 1139) or any provision in any other Federal Milk Market Order; the milk of any dairy farmer, that is delivered to or diverted from a supply pool plant during any month that such pool plant has pool plant status by reason of transfers of milk from such supply plant to pool distributing plants during preceding months, shall not be 'producer milk' unless at least 26 days' milk production of said dairy farmer was delivered to said supply plant during each of said preceding months." (Proposal 6)

The present diversion provisions appearing in Section 139.13(d)(2) and (3) should be revised as stated in Proposal No. 7, whereby the requirement to permit the diversion of the milk of any producer shall be changed from the present provision - "from whom at least 20 percent of his milk production is received during the month at a pool plant," to "from which at least 20 days of his milk production is received at a pool plant during the month." (Proposal 7)

IX

Revision of Section 1139.7(a)(1),

Distributing Pool Plant. Proposal No. 2

At the hearing, said four nonmember producers revised their Proposal No. 2 in the Notice of Hearing, by changing the 65 percent factor, stated in Proposal 2 at 1139.7(a)(1), to 60 percent. The provision at 1139.7(a)(1), so revised, follows:

> "(1) Route disposition, except filled milk, representing not less than 60% of its total receipts of Grade A fluid milk products (including milk diverted from such plant to a nonpool plant pursuant to Sec. 1139.13); and "

The revision to 60 percent of the 50 percent factor in the present 1139.7(a)(1), would reduce the amount of excess, unneeded milk that may be recognized and treated as "producer milk" associated with the Order 139 distributing pool plants; would reduce the amount of milk that may be loaded on the Order 139 pool, either by transfer of producers from other Orders or by way of transfer of bulk milk from other Order pool plants; and would foreclose to some extent the lowering of the Order 139 blend that has been maneuvered since the Order became effective (to as low as 50 percent Class I in the month of June 1974).

It was found and determined by the Secretary in the original decision on the Lake Mead Order, in the Federal Register of June 7, 1973, that "no butter, hard cheese or nonfat dry milk is manufactured by the Southern Nevada plants or by the plant at Cedar City, Utah." The Secretary also found and determined

that "Producers associated with this market are not expected to produce large quantities of milk in excess of the market's fluid needs."

The fluid needs are the Class I needs. The Class I needs are the needs for which milk of Grade A quality is required by the health authorities. The "producer" definition in the Order is in terms of one "who produces milk eligible for distribution as Grade A milk in compliance with the fluid milk requirements of a duly constituted health authority."

It is not necessary to an adequate supply of producer milk of an Order 139 pool distributing plant, that a quantity of Grade A producer milk be attached to or pooled at such plant, equal to twice the quantity of Class I milk marketed by such distributing plant. That is the effect of the present 50 percent factor in Section 1139.7(a)(1).

Producers on this Order 139 Grade A market should not be subjected to an unreasonable low and depressed blend or take-home price by having the pool plant requirements too lax. Such a circumstance also invites and induces producers from other markets, where the milk is otherwise Class III, to become loaded on the Order 139 pool as producer milk, and to share in the Class I sales of the Order 139 market, and reduce to an unreasonably low value the blend or take-home price of producers who are actually, properly associated with the Order 139 market.

The Federal Order 139 should be designed for the Order 139 Grade A fluid market, and should not be reduced or converted to a regulatory scheme whereby outside interests may pay a relatively high price to procure milk for cheese and milk powder production, at the expense of the Grade A producers actually supplying milk appropriate to an adequate supply for the Order 139 Grade A fluid market.

Under the 50 percent factor presently in the Section 1139.7(a)(1) a distributing pool plant could have associated with it, as pooled producer milk, another 100 pounds of milk for each 100 pounds of Class I milk.

The Proposal No. 2, supported by said four nonmember producers, which would substitute a 60 percent factor for the present 50 percent factor, would permit the distributing pool plant to remain pooled under the Order if there were associated with the plant for every 100 pounds of Class I milk, a reserve of 66 pounds.

The 60 percent factor is a very modest revision of the present 50 percent factor. It would create an Order 139 that is more in the long range interests of producers, handlers and consumers. It would more nearly conform with the Secretary's finding, when he issued Order 139, that there should not be associated with the Order 139 market large quantities of producer milk in excess of the market's fluid needs.

The revision of said present 50 percent factor, to 60 percent, should be adopted.

X

Revision of Section 139.13(d)(2) and (3), Diversions. Proposal No. 7

Proposal No. 7 would amend the present Section 1139.13 to provide that in order for a producer's milk to be diverted and have such diverted milk remain in the Order 139 pool as "producer milk," at least 20 days' production of such producer must be received at a pool plant during the month. Said revision would replace the present requirement that 20 percent of such producer's production be received during the month at a pool plant. The extent to which diverted milk may be retained in the pool as producer milk, together with the pool plant requirements, determines the extent to which the unneeded milk may be loaded on the Order 139 pool to depress the blend price. The present diversion provision in these respects are too lax.

Proposal No. 7 should be adopted.

In this connection, said four nonmember producers oppose vigorously the adoption of Proposal No. 9, which would facilitate the loading of the Order 139 pool to an even greater extent than is now practiced.

While the present provision provides that a cooperative association may divert not more than 30 percent in the months of March through July, and not more than 20 percent in the other months of the year; Proposal 9 would enlarge that amount to 40 percent and 30 percent respectively, and thus facilitate an even greater loading of unneeded milk than is now practiced.

Also, another feature of Proposal No. 9, whereby two or more cooperatives could have such allowable diversions computed on a combined basis, would create an even more aggravated loading of the Order 139 pool with unneeded milk.

Also, the feature of Proposal No. 9, that would not require that any of the milk of the producer be delivered to a pool plant in order to permit the diversion of that producer's milk during months other than August through February, and would require only three days' delivery of the producer's milk during the months of August through February, would facilitate, encourage and effect a gross enlargement and aggravation of the loading of the milk onto the Order 139 pool.

Proposal No. 9, in its entirety, should be denied.

(Tr. pp. 330-331)

XI

Supply Pool Plant, Section 139.7(b)

Proposals 2 and 6

It is the position of said four nonmembers that -

(1) Section 1139.7(b) should be stricken, in its entirety. The Order should not make provision for a supply pool plant.

(2) If the Order makes provision for a supply pool plant, the provision should not provide pool plant status to a supply plant for any month by reason of transfers of milk from such supply plant to pool distributing plants during any preceding month or months.

(3) If it is provided that a supply plant shall have such automatic pool status for any month or months, there should be incorporated within such provision the following proviso:

> Provided, That notwithstanding any provision in this part (Lake Mead Order) or any provision in any other Federal Milk Market Order; the milk of any dairy farmer, that is delivered to or diverted from a supply pool plant during any month that such pool plant has pool plant status by reason of transfers of milk from such supply plant to pool distributing plants during preceding months, shall not be "producer milk" unless at least 26 days' milk production of said dairy farmer was delivered to said supply plant during each of said preceding months.

The promulgation decision, Federal Register January 7, 1973, page 15011, reveals that there were no supply plants in the Lake Mead market at the time of the promulgation hearing, and indicates that there was no basis of justification in the promulgation hearing record for the provision of a supply plant, or a supply pool plant, definition in Order 139. The only justification offered in the promulgation decision is the statement that -

> "Perhaps supply plants will become associated with the market in the future "

This record does not disclose need or justification for the operation of a supply plant, or a supply pool plant, under Order 139; the record clearly shows that there exists no such need or justification.

The nearby Great Basin Order and the nearby Western Colorado Order function without the operation of a supply pool plant.

Many years ago, in the 1930-1940 period, at the time when Federal Milk Orders were first issued, milk supply for regulated metropolitan markets came in from farms located at considerable distances from the processing plants. Milk was produced by relatively small production herds, compared to operators today in the Lake Mead area.

In those days there were practically no on-farm refrigeration equipment. The milk was moved from farms in ten-gallon cans, into collecting points or receiving stations,

where it was cooled to low temperatures by mechanical refrigeration before it was transported to the metropolitan market for processing into the consumer packaged fluid milk products. In those days receiving stations, or supply plants, were an appropriate part of an overall marketing system, and it was appropriate that provision for such supply plants be incorporated or integrated into the Federal Order regulations. Such circumstances did not exist in the Lake Mead market when the Order was promulgated, and do not now exist. A supply plant is not a needed device to keep the Lake Mead Order market adequately supplied or to get the milk into the processing plants from production farms.

No valid reasons or circumstances have arisen or developed that require that the milk produced on farms supplying the Lake Mead market be channeled through and unloaded into a receiving plant, to be cooled there, and then be loaded out onto another truck and transported to the processing plant, in order to get the milk delivered to the processing plant in condition appropriate to the requirements of the governing health authority regulations.

Today the milk produced on the farms in the Lake Mead Order market is not moved to market by the ten-gallon can collecting system without adequate farm refrigeration. The milk production for the Lake Mead Order market is produced from relatively large production herds. The milk goes from the cow directly into refrigerated bulk tanks located on the farm proximate to the milking unit, where the milk is stored until picked up in

over-the-road tankers for the haul to market. The farm tanks are equipped with high capacity, efficient refrigeration equipment, which cools and maintains the milk in the farm tank at temperatures within the range of 35-40 F. The over-the-road tankers are heavily insulated. The milk arrives at the processing plants well within the limits of tolerance required by the health authority.

The only "supply plant" that has developed under Order 139 is what Lake Mead Cooperative has called a "supply plant," located at Minersville, Utah. This record clearly evidences that the intent and purpose of the operation of such a facility by the Lake Mead Cooperative is to some extent the circumvention of Federal Order location adjustment provisions (Tr. pp. 101, 303, 310); but mainly for the pressure pooling of excessive supplies of Order 139 producer milk to load and flood the Order 139 pool to the severe money damage of said four nonmembers, with corresponding unjust enrichment (Ex. 26) to the cooperative responsible for the flooding; in an attempt to force the nonmembers into cooperative membership, or out of production, thereby eliminating the nonmembers as competitors of the cooperatives in supplying producer milk to the Order 139 market.

The facts developed in this record lead to the proper conclusion that such "supply plant" at Minersville, as a true

supply plant needed for the purpose of getting an adequate supply of milk to the Lake Mead Order market, is unreasonable and is fictitious.

(Tr. p. 239)

The record shows that what is now the Minersville "supply plant" was previously a community barn or milking facility at Minersville. This facility, which is now called the "supply plant" by Lake Mead Cooperative, regularly serves the four producting herds or units that are located in the community barn at the location of the "supply plant." (Tr. p. 306). The milk produced by three other production units, located in individual barns in the general Minersville area, is picked up in a tank truck and transported to the "supply plant," into which the milk is pumped, and immediately the contents of the tank at the supply plant are pumped back out into the tank truck, which then carries the milk to distributing pool plants or manufacturing plants (Tr. p. 299). However, at times, milk produced at the community barn is pumped out of the "supply plant" into a tank truck, which then goes to said three individual farms in the Minersville community and pumps the milk from those farm tanks into the tank truck, with the truck then delivering the contents to distributing pool plants or to manufacturing plants. (Tr. p. 309).

For many years prior to the promulgation of Order 139 and the designation of the Minersville facility by Lake Mead Cooperative as a "supply plant," all of the milk from said

four production units was regularly transported by direct shipment from the individual milking facilities to the distributing pool plants. (Tr. p. 266)

The record shows that except for the night milking of the herds at the barn in which the Minersivlle "supply plant" is housed, the other milk that is routed through said "supply plant" remains in the tank only five minutes to one hour and one-half, the time involved in the pumping in and pumping out procedure (Tr. p. 299).

In the months of May and June 1974, Lake Mead Cooperative, in concert and collaboration with Western General Dairies, arranged for the milk, of twelve Western General Dairies producers that formerly shipped on the Order 136 market (Tr. pp. 204, 276), which was surplus milk on the Order 136 market (Tr. p. 317), and was not needed on the Order 139 market (Tr. p. 320), to leave the Order 136 market and to be routed through the Minersville "supply plant" as Order 139 producer milk, thus greatly increasing the amount of Order 139 producer milk in the pool and severely depressing the Order 139 blend price.

This maneuver was obviously a concerted action on the part of the two cooperatives, inasmuch as the management of the Lake Mead Cooperative determines what milk is received into the Minersivlle "supply plant." The maneuver was worked out by the management of Lake Mead Cooperative and Western General Dairies (Tr. pp. 206, 280).

By this maneuver, Western General Dairies milk that had been producer milk on the Order 136 market, as Class III milk, was increased in money returns, to the Order 139 blend price, by being so qualified as Order 136 producer milk (Tr. pp. 205, 317).

The Lake Mead Cooperative shared in this increased return (Tr. p. 204).

When the Order 139 five-month automatic pool qualification period for the Minersville "supply plant" came to an end, and the "free ride" for the Order 136 milk on the Order 139 pool as Order 139 producer milk came to an end, the milk was moved back to the Order 136 market (Tr. p. 319).

It is apparent from the manner in which the supply pool plant provision has been used, that the application of that provision has been for the purpose of loading onto the Order 139 pool unneeded milk, with the resultant money damage to nonmember producers under Order 139, and the financial gain and unjust enrichment to those who so loaded the unneeded milk on the Order 139 pool (Tr. p. 239).

The supply plant provision of the Order 139 is not needed to maintain and to move an adequate supply of milk to the Order 139 market, but it has been used and abused, contrary to the orderly marketing objectives of the Agricultural Marketing Agreement Act.

There is no provision in the Act, the law which gives the U. S. Secretary of Agriculture his limited power, authority and responsibility to issue and administer Federal Milk Orders, that requires the Secretary to incorporate a supply pool plant provision in every Federal Milk Order that the Secretary issues.

The Courts have recognized that the Secretary must apply his Federal Order program with "practical regulatory significance." In view of what has transpired in the Order 136 market as the result of the Order 136 supply pool plant provision and application, said provision clearly does not meet said standard and requirement of "practical regulatory significance." The proper action of the Secretary as a result of this hearing, with respect to said supply pool plant provision, is that it be eliminated from Order 139, in its entirety (Tr. p. 240).

Said action of loading producers on the Order 139 pool during said period of automatic pool qualification of the Minersville "supply plant" constitutes a blatant assault on the integrity of the Federal Milk Order program. Said development has now created a test as to whether the Act is to be administered and the Orders are to be provided to accommodate to the aggrandizement of the cooperatives and to facilitate predatory practices of cooperatives at the expense of nonmembers, and to provide a vehicle for the violation of the anti-trust and anti-monopoly laws; or whether the Act is to be administered and the Orders are to be provided for the purpose of the provision and maintenance of orderly marketing, and the provision and dispensation of equal

and justice to nonmembers and to cooperatives, alike, without prejudice or discrimination.

In the decision in this docket, the Secretary should amend Order 139 as detailed in the three underscored paragraphs, numbered (1), (2) and (3) at the beginning of this Section XI of this Brief.

XII

The testimony of three of the individual nonmembers - Hunt, Biasi and Jensen.

It is highly appropriate and desirable, in attempting to seek a just correction and solution to these matters, that the attention of the Secretary be directed to the testimony of three nonmember producers - Hunt (Tr. p. 345-353), Biasi (Tr. pp. 357-362), and Jensen (Tr. pp. 362-364), which will be briefed below. By reviewing said testimony in detail, the Secretary should be able to better place himself in the position of said nonmembers in considering the Secretary's decision.

Mr. Hunt is a milk producer, with his milk being pooled under Order 139 by reason of being sold to the Anderson Dairy, Inc. pool plant under the Lake Mead Order. His farm is located at Bunkerville, Nevada. His father operated the dairy farm for about 20 years. Hunt took over the operation about three years ago.

Hunt is not a member of a dairy cooperative association. He has not found it desirable to join such an association. He believes that he is capable of marketing his milk production without the assistance, direction, or control of a cooperative association, or any other similar agency. He has no complaint against dairy farmers who desire to market their milk through such association. He feels that they should be free to join such an association and market their milk through such an association if that is their choice; but he should be free

from any coercion or pressure, economic or otherwise, on him to join such an association and have such association market his milk.

Particularly is he opposed to any government regulation that makes such coercion and pressure possible, or is the tool or device through which such coercion and pressure is applied.

He knows about the anti-trust suits that have been brought by the Department of Justice against large cooperatives in this country, because said suits have been given a lot of publicity. Such suits are in progress against AMPI cooperatives, against Mid-America cooperative, against Dairymen, Inc. cooperative.

One of the strong compliants of the Department of Justice in the AMPI case and in the Mid-America case was the activity of these cooperatives, in flooding local markets with milk so as to lower the price received by independent, nonmember producers. He has read that AMPI and the Department of Justice have entered into a consent degree which enjoins and prohibits its practices. He has also read about the State of Texas suit against AMPI which is generally on the same basis as the Department of Justice suit.

The consent degree in the Texas case prohibits the Association from qualifying milk under a Federal Milk Marketing Order for the purpose of forcing, coercing or inducing nonmembers to join the association or to cease selling milk in competiton with them.

As Hunt sees the picture, this has been the purpose of the loading of milk that has taken place on the Order 139 pool; to drive Hunt and the other nonmembers out of production, or into the membership of the cooperative; either of which would eliminate Dale as a competitor of the cooperatives in supplying producer milk to the Order 139 market.

In prior discussions with Mr. Charles Cameron, manager of the Lake Mead Cooperative Association, about the pros and cons of being a member of the association, Mr. Cameron advised Hunt that it was much better if everybody belonged to the cooperative; and further stated to Hunt that the Lake Mead Order market could be flooded with milk so as to severely hurt, or to financially break or destroy nonmember producers.

At the time the proponents of the Order were "selling" the Lake Mead market on bringing in the Federal Order, most of the producers were receiving upwards of 80 percent Class I. The Federal Order was "sold" to the market by the proponents on the basis that the Order would raise the blend to 90 percent Class I. Instead of that, Dale and other producers have seen the blend brought down to 50 percent Class I.

The Lake Mead Order market has been flooded with milk. The Class I percentage utilization in the pool has been carried down from approximately 80 percent, to 50 percent, in the month of June. The Order 139 price per hundredweight for Dale's milk has been severely depressed. Dale is trustful that after the completion of the record the Secretary will be prompted to terminate

the Order or to make appropriate amendments to correct the situation. All of the producers on the market except the four nonmembers who submitted proposals at this hearing are controlled or directed by Western General Dairies and by Lake Mead Cooperative.

As a nonmember, Dale has no offset or insulation against such drastic drop in income for his milk production marketed on the Lake Mead Order market, caused by the loading of the milk on the Order 139 pool. On the other hand, Western General Dairies and Lake Mead Cooperative, who would load on the Lake Mead pool milk that was otherwise Class III before being placed on the Lake Mead Order market, improved their returns for that milk, by going from the Class III price to the Lake Mead Order blend price. In Dale's appraisal of the record at this hearing, the loading of the milk on the Lake Mead Order pool resulted in a drastic loss of income to him as a nonmember, while those who loaded the milk on the pool were unjustly, financially enriched in the same amount.

The implications are rather clear to Dale. If such loading is to continue, he has two choices -- either join the association or get out of milk production as a competitor of the cooperative. Obviously, when such practices achieve their purposes of eliminating nonmember competitors, the pressure pooling will stop, and the cooperatives will have achieved a complete monopoly of milk supply to the Lake Mead Order market.

Dale understands that the law of our country abhors monopoly, that Congress many years ago enacted certain laws to prevent and defeat the creation and functioning of such monopolies, as adverse to the interest of consumers and to the public interest; that Congress has delegated to other agencies the enforcement and administration of such anti-trust and anti-monopoly laws. Dale cannot see how the U. S. Secretary of Agriculture, another agency of our same government, can continue to provide Order 139 in such manner as to improperly deprive him of income for his milk production, with such reduction winding up in the treasury of the cooperatives, and thereby permit and encourage such monopoly practices that will either force Dale out of milk production, or into the dominion and control of the cooperatives who would monopolize.

Dale is urgently requesting the Secretary to either terminate Order 139, or to immediately revise it to give non-member producers the protection they are supposed to have against such practices.

Dale is informed that sometime ago in a meeting held in Southern Utah area a representative of Western General Dairies, through Hi-roe, brought a vote of the farmers as to whether or not they wanted to flood the Lake Mead Order and destroy Anderson Dairy. It appears to Dale that the flooding has been accomplished. (Tr. pp. 345-353)

Mr. Biasi has been operating a milk production herd for 17 years in the Lake Mead area. The milk is now pooled under Order 139 by reason of shipment to a pool distributing plant, Anderson Dairy, Inc. Mr. Biasi supports the testimony given by Mr. Mimms and by Mr. Hunt. He concurs 100 percent with what Mr. Hunt had to offer. When Order 139 was first considered for the market, he was approached by the proponents and was told "if you don t join, we are going to water down your market." The testimony at this hearing shows that this has been done. Biasi was told that the Order would provide him 90 percent Class I utilization; which was false. The Class I percentage has been driven down to 50 percent,and has driven the price down. The watering down has been done. Order 139 has not stabilized the market. The former 80% - 20% utilization, that prevailed for many years, has been driven down to 50% Class I. The Order obviously has loop holes for such circumstances to develop.

It is a fact that the producer milk is being hauled from the Mesquite area to the Minersville plant and back again. The drivers have told Biasi personally - this information comes from the horses mouth. It is being done to keep the Minersville plant in compliance, and to water down the market.

The plant at Minersville is actually not a supply plant. Biasi, in his individual herd operation, has a 6,000 gallon tank, such as Lake Mead is being permitted to employ as a supply pool plant. Considering the time required for pumping

in and pumping out of such a 6,000-gallon tank, and the time required for washing the tank, it is impossible for a 6,000-gallon tank to serve as a supply plant at Minersville as described by Lake Mead Cooperative. He sees no need for the operation of the Order 139 so-called supply plant at Minersville. It is an advantage to other producers because it can be used to water down the Order 139 pool and take money away from the nonmember producers. The only reason for such supply plant is to hurt Biasi and the other nonmembers. (Tr. pp. 357-362)

Mr. Jensen is a milk producer who has produced milk since the end of World War II. He sells his milk to an Order 139 distributing pool plant, Anderson Dairy, Inc. Mr. Jensen's milk is pooled and priced under Order 139. He completely agrees with everything Mr. Hunt and Mr. Biasi said in their testimony; he has experienced everything they have experienced. Before Order 139 came into the market, there was an ample supply of milk to this market controlled by the State Dairy Commission, which answered the needs of this market very well. Before the Federal Order came on the market, the market was amply supplied without any substantial surplus being produced, or even needed. (Tr. pp. 362-364)

XIII

Effective Date of the Final Decision on this Docket. Suspension Action.

The Secretary should process this docket to a final decision to be effective on or before March 1, 1975.

Absent an effective decision by said date, the Secretary should suspend from Section 1139.7(b) the following provision:

> "Any supply plant that has qualified as a pool plant in each of the immediately preceding months of August through February shall be a pool plant in each of the following months of March through July unless written request for nonpool status for any such month is filed by the plant operator with the market administrator prior to the first day of any such month. "

Considering that the present Order, through the present supply pool plant provisions at Section 1139.7(b) and the automatic pool qualification period provided therein for supply pool plants, will permit the practically unlimited loading and flooding of the Order 139 pool with producer milk beginning March 1, 1975; if the decision on this docket is not made effective on or before March 1, 1975, said provision in Section 1139.7(b):

> "Any supply plant that has qualified as a pool plant in each of the immediately preceding months of August through February shall be a pool plant in each of the following months of March through July unless written request for nonpool status for any such month is filed by the plant operator with the market administrator prior to the first day of any such month. "

should be suspended, under the suspension powers granted to the Secretary in the Act, pending the final decision on this docket.

The record has clearly, conclusively demonstrated that said provision in Section 1139.7(b) does not promote the orderly marketing objectives of the Act, and in the words of the Act, at Section 608(c)(16)(A), obstructs and does not tend to effectuate the declared policy of the Act.

Respectfully submitted,

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