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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. AO-14-A73, ET AL.
DA-03-10

Federal Order Hearing
June 20, 2005
Pittsburgh, Pennsylvania

In Re:

MILK IN THE NORTHEAST AND OTHER
MARKETING ORDERS

FLUID MILK PRODUCT DEFINITION

Brief submitted on behalf of
O-AT-KA Milk Products Cooperative, Inc.
by Timothy R. Harner, Esq., General Counsel of
Upstate Farms Cooperative, Inc.

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O-AT-KA MANUFACTURES CLASS II SPECIALTY BEVERAGES

O-AT-KA is owned by dairy cooperatives representing over 2000 dairy farmers in several Northeastern states. (Ex. 18, at 1). Craig S. Alexander testified for O-AT-KA in support of National Milk's proposal. Mr. Alexander is an expert dairy witness who has testified at numerous state and federal order hearings based on his broad experience with cooperatives, trade associations, and academic institutions over the past 20 years. (Ex. 18, at 1).

Mr. Alexander described the specialty beverages that O-AT-KA has been producing: "formulas for specialized dietary use, alcoholic beverages, infant formulas, [and] drinks with dairy ingredients containing less than 6.5% nonfat solids (including coffee products) . . ." (Ex. 18, at 1-2).

Under past and current USDA implementation of milk market regulations, all of these beverages have been classified as Class II products. The grounds for their Class II designation is: "[e]ither they contain less than 6.5% nonfat solids, or they are exempt under the dietary use provision of the fluid milk definition and packaged in hermetically sealed containers." (Ex. 18, at 2).

THESE SPECIALTY BEVERAGES SHOULD REMAIN IN CLASS II

Based on his extensive experience and education involving milk orders, including California's regulations, Mr. Alexander explained why these specialty beverages should remain in Class II: "the nutritional drinks we produce have not competed in traditional fluid milk markets and should remain as Class II products under the specialized formulas for dietary use in hermetically sealed containers that are exempt in the current fluid milk definition." (Ex. 18, at 3).

There has been some discussion about clarifying the language regarding "meal replacement" and "hermetically-sealed containers." However, "it is apparent that there is not sufficient understanding what the problem is. Nor is there a consensus on what, if any, changes to make to the language at this point." (Ex. 18, at 5).

For example, some of the "high protein shake drinks" that O-AT-KA "packages in hermetically sealed cans and commercially sterilizes for long shelf life" have up to "five times the amount of protein normally found in fluid milk products." Since "[t]hey are sold for use by athletes and body-builders in a ready-to-drink beverage as an alternative to the original powdered formulas, and used as a meal replacement or meal supplements to add protein to the diet . . . , [t]hey are not sold as an alternative to milk." (Ex. 18, at 5-6).

Similarly, O-AT-KA co-packages "specialized long shelf life nutritional meal replacement type drinks intended for dieters, and for geriatric or pediatric use. . . . Formulation often requires dry caseinates or milk protein concentrates, and addition of significant added vitamins and minerals." Such products "are often labeled as 'complete and balanced nutrition' on the display panel." (Ex. 18, at 6). Such products are not competitive "on a cost basis with traditional fluid milk products" because "[t]he additional protein and vitamins are already high cost ingredients" and there are significant "costs of hermetically sealed [cans and glass bottles] and commercial[] sterilizat[ion]." (Ex. 18, at 7).

This approach is consistent with the language and application of Federal milk order provisions for decades, as set forth in detail in Mr. Alexander's testimony and in his cross-examination by Ms. Antoinette Carter, (T. 435-440).

Accordingly, **"O-AT-KA believes that until there is further study and consensus, no changes should be made in the language or application of this exemption."** (Ex. 18, at 7).

O-AT-KA SUPPORTS NATIONAL MILK'S PROPOSAL

a. Consistent with current practice

“O-AT-KA supports the National Milk proposal to convert the 6.5% nonfat solids exemption on beverages containing milk ingredients to 2.25% protein.” “National Milk’s proposal simply provides additional clarification to de facto administration of the rules,” in light of technological changes such as using ultrafiltration to concentrate the proteins in milk. It confirms that “protein is the key ingredient for establishing what is and is not a Class I product.” (Ex. 18, at 4).

Meanwhile, maintaining a 2.25% protein threshold provides a number of benefits to the dairy industry and dairy producers, as set forth on pages 4-5 of Exhibit 18. Essentially, the 2.25% protein threshold is likely to increase the use of dairy ingredients in beverages that are not “in the competitive sphere of the traditional milk beverages.” (Ex. 18, at 4-5).

b. Rules can develop as technology evolves

It was clear from much of the testimony at the hearing that the pace of technological change in the dairy industry is increasing. The challenge is to be flexible enough to respond quickly to such changes, yet to provide a stable framework for milk pricing that enables the marketplace to function smoothly to the benefit of producers, processors, and consumers.

In the face of such changes, O-AT-KA’s approach is pragmatic and cautious. O-AT-KA avoided sweeping changes to the definition and application of terms such as “dietary use,” “hermetically sealed,” and “meal replacement.” Instead, O-AT-KA supported waiting to address these issues until a greater consensus on the best solution can be reached among producers, processors, and consumers.

c. Interim rules permit faster regulatory responses to new technologies

Furthermore, O-AT-KA supports a proposal for promulgating interim rules that was introduced by DFA. (T. 18 at 2)

This proposal for interim rules strikes a wise balance between flexibility and consensus. By permitting the USDA to act immediately in light of new technologies, the milk orders can respond quickly to such developments. On the other hand, by requiring a hearing on the interim rule within a year of its promulgation, the proposal requires public input before a final rule can be implemented—input which hopefully will build a consensus around one or more reasonable approaches to account for the new technology so that USDA can choose what is best for producers, processors and consumers.

Another area that needs such a wise balance between flexibility and consensus is how to treat specialized dietary use products in hermetically sealed containers. Mr. Alexander set forth six reasons affecting the wisdom of continuing the exemption from Class I for such

products. Since some of these factors can vary over time (such as how products are marketed, and the cost and feasibility of using soy and whey in beverages), it is best to proceed cautiously as events unfold, rather than to speculate about what may happen in years to come.

CONCLUSION

O-AT-KA supports NMPF's Proposal 7, and DFA's proposal for interim rules. Both proposals make incremental modifications to Order language to account for new technologies. But neither proposal "resolves" future disputes that are wisely left until future hearings.

Respectfully submitted on behalf of
O-AT-KA Milk Products Cooperative, Inc.

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