

Benjamin F. Yale & Associates Co., L.P.A.

ATTORNEYS AT LAW

102 West Wapakoneta Street
P.O. Box 100
Waynesfield, Ohio 45896-0100
419-568-5751

Fax: 419-568-6413

Website: www.yalelawoffice.com

Email: benyale@cs.com

Benjamin F. Yale*

Kristine H. Reed+

USDA
01/17/00

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*also admitted in New Mexico and Texas

+also admitted in Indiana

RECEIVED

December 22, 2000

Hearing Clerk
Room 1083
South Building
United States Department of Agriculture
Washington, D.C. 20250

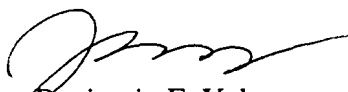
RE: MILK IN THE NORTHEAST AND OTHER MARKETING AREAS

Dear Sir or Madam:

Please find enclosed, in regards to the matter mentioned above, the Final Decision to be filed. Please return filed stamped copy in the envelope provided. If you should have any questions please do not hesitate to call this office.

Sincerely yours,

BENJAMIN F. YALE & ASSOC. CO., LPA



Benjamin F. Yale

BFY:slr

Enclosures

BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE

460A
DALJ/HCS

2001 DEC 27 P 3:06

In the Matter of

MILK IN THE NORTHEAST AND
OTHER MARKETING AREAS

RECEIVED

: DOCKET NO. AO-14-A69, et al.
: DA-00-03
:

**MOTION TO FOR ADMINISTRATIVE STAY OF A PORTION OF THE TENTATIVE
FINAL DECISION**

This Motion, pursuant to 7 C.F.R. Part 900 is made on behalf of the following cooperatives: Select Milk Producers, Inc., Continental Dairy Products, Inc., and Elite Milk Producers, Inc. (Producer Organizations). National All Jersey as agreed to this request as well. Other organizations are being polled for their consent which, if provided, will be forwarded to the Secretary.

The named producer organizations request that those portions of the Tentative Final Rule as found at 65 Fed. Reg. 76832-61, December 7, 2000, proscribing a separate Class III butterfat price be stayed pending a rulemaking hearing on that issue. Provisions to modify make allowances and yields are not impacted by this request. Attached as Appendix A are proposed changes to modifications in the Tentative Decision which are necessary to effectuate this request.

This challenge is not made on a claim that the ultimate choice of the Secretary was unwise. After properly noticed, testified, briefed, and considered, it may be the best solution. Instead, that debate is for another day. Instead this extraordinary request arises out of a deep concern that the rulemaking process has been seriously compromised exposing the federal order program to serious risks.

Simply put, procedurally, the creation of a separate class III butterfat price is the result of a

flawed and illegal administrative process because:

- * Proposals for the creation of a separate class III butterfat price were never noticed,
- * The only proposal for a separate class III butterfat price was made at the hearing and , with the consent of the Department, it was stricken as a proposal.
- * No other proposals for a separate class III butterfat price were discussed, testified about, or otherwise mentioned in the hearing or in subsequent briefs.
- * The only basis upon which the Department indicated it would consider a separate class III butterfat price was in response to proposals to reduce the class IV price, proposals rejected by the Secretary.
- * All proposals for changes in make allowances, yields, and component prices were predicated on no change in the use of class IV butterfat for class III.

FAILURE TO IMMEDIATELY STAY ADMINISTRATIVELY THOSE PROVISIONS RESULTING FROM THE ILLEGAL ADMINISTRATIVE PROCESS PUTS THE REST OF THE DECISION AT RISK OF SUCCESSFUL COURT CHALLENGE. THAT SHOULD BE AVOIDED.

The reasons supporting this request are as follows:

1. In the Notice of Hearing, the Government proposed the following:

Class III and Producer Butterfat Prices

Proposals to change the Class IV butterfat price that would not also result in changes to the Class III butterfat price raise the issue of whether the butterfat price for milk used in Class III should be based directly on the value of butterfat in cheese instead of the value of butterfat in butter. One of the primary considerations for incorporating some of the value of butterfat in cheese into the protein price was to maintain a single

butterfat price for milk used in manufactured products. Changing the protein price calculation to reflect only the value of protein in cheese, with a separate Class III butterfat price calculation is an issue that should be considered at the same time as the proposals to reduce the Class IV butterfat price. Data and testimony concerning yield factors specific to butterfat in cheese would be appropriate additions to the hearing record.

Proposal 32 of Notice of Hearing [emphasis added]

2. The necessary condition to consideration of a separate class III butterfat price, a lower class IV butterfat price, was subsequently rejected by the Secretary in the Tentative Decision.
3. In the Notice of Hearing, there were no proposals identifying a separate class III butterfat price.
4. At the hearing, only one witness, Dr. David Barbano, proposed a separate butterfat price for cheese. Upon objection by participants the Administrative Law Judge clearly stated that the proposal would not be considered.
5. The government expressed its position as follows:

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19 JUDGE HUNT: Well, we don't have unlimited
20 discretion to testify to anything that somebody wants to
21 testify. It has to be within the scope of the hearing. And
22 on that, I would like to have the Department address the
23 point, either Mr. Cooper or Ms. Brenner.
24 MR. COOPER: Well, like Mr. Berde, I don't life on
25 the website. So I have no idea what Mr. Barbano -- Dr.

1 Barbano is going to say today. From the few conversations I
2 have had in the last few minutes about what he is going to
3 say, it would seem to be that he may have labeled things as
4 proposals which are beyond the scope of the hearing notice.
5 But at the same time, the information that he is
6 giving there may also be useful with regard to existing
7 proposals or with the request at the end of the hearing
8 notice as to studying the effects of how all this relates to
9 the Class III price. And to the extent that there may be a
10 proposal that wasn't noticed and is not just a modification
11 of the other proposal, I agree that we can strike it at the
12 end to that extent.
13 To the extent he has information that may be
14 valuable in setting the butterfat prices and considering the
15 yields and such, that information can be received. So I
16 would suggest that we hear his testimony. And then anyone
17 who wants to strike portions of it can fire away. And we
18 will make up our minds then.

Transcript at 510-511. [Emphasis added].

6. The Tentative Final Decision rejected all proposals to create a separate butterfat price for class IV. This rejection of these proposals rendered the notice in the hearing notice moot.

7. Since Barbano's proposal was the only potential separate class III butterfat proposal to be considered, when the ALJ struck it as a proposal with the consent of the Department's counsel, it was abundantly clear to all participants at the hearing held May 11-14 in Alexandria, that there would be no separate class III price.
8. All proposals and testimony for and against the proposals for make allowances and yields were based upon the unchallenged assumption that class III butterfat price would not be separated from the class IV.
9. The requested stay of administrative action can be done without doing violence to the rest of the rule and without violating the statute that compelled the hearing.
10. The only parties potentially harmed by this stay are processors of cheese and the National Cheese Institute has requested the same relief.
11. The change will not harm producers.
12. It would be abundantly unfair to make such a significant change to the pricing mechanism when there was no proposal noticed to do so, the only proposal for a separate class III butterfat was stricken by the ALJ with the support of the Department, and proposals for a separate class IV butterfat price were rejected.

Respectfully submitted,
BENJAMIN F. YALE & ASSOC. CO., LPA



BENJAMIN F. YALE, OH #0024730
KRISTINE H. REED, OH # 0066668
102 W. Wapakoneta
P.O. Box 100
Waynesfield, OH 45896
419-568-5751
419-568-6413 Fax

CERTIFICATE OF SERVICE

I hereby certify that an accurate photostatic copy of the foregoing was served upon the following this 22 day of December, 2000, by ordinary United States Mail service, postage prepaid.

The Honorable James W. Hunt, ALJ
United States Dept. of Agriculture
Room 1081, South Building
1400 Independence Avenue SW
Washington DC 20250

Constance M. Brenner
P.O. Box 96456
Washington, DC 20090-6456

Sydney Berde, Esq.
SYDNEY BERDE & ASSOCIATES P.A.
7327 East Echo Lane
Scottsdale AZ 85258

✧ Marvin Beshore, Esq.
MILSPAW & BESHORE
P.O. Box 946
Harrisburg, PA 17108-0946

† ✧ Keith Collins
Chief Economist
U.S. Department of Agriculture
Jamie L. Whitten Federal Building
Room 112-A
14th Independence Avenue, S.W.
Washington, D.C. 20250

† ✧ Kathleen Merrigan
Administrator
Agricultural Marketing Service
U.S. Department of Agriculture
South Agriculture Building
Room 3071
1400 Independence Avenue, S.W.
Washington, D.C. 20250

† ✧ Gregory Cooper, Esq.
Office of General Counsel
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, D.C. 20250-1417

✧ Charles M. English, Jr., Esq.
Wendy M. Yoviene, Esq.
Thelen Reid & Preist, LLP
701 Pennsylvania Ave. NW
Suite 800
Washington, D.C. 20004

✧ Steve Rosenbaum, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

✧ John Vetne, Esq.
79 State Street
Newburyport, MA 01950

Larry Salathe
Agricultural Economist
U.S. Department of Agriculture
Jamie L. Whitten Federal Building
Room 112-A
14th & Independence Avenue, S.W.
Washington, D.C. 20250

† ✧ Richard McKee
Deputy Administrator, Dairy Programs
Agricultural Marketing Service
U.S. Department of Agriculture
South Agriculture Building
Room 2968
1400 Independence Avenue, S.W.
Washington, D.C. 20250

John Mengel
Chief Economist, Dairy Programs
Agricultural Marketing Service
U.S. Department of Agriculture
South Agriculture Building
Room 2753
1400 Independence Avenue, S.W.
Washington, D.C. 20250

✓ Brad Olsen, Esq.
Leprino Foods
1830 West 38th Avenue
Denver, CO 80211

† ✱ Michael Dunn
Under Secretary for Marketing &
Regulatory Programs
U.S. Department of Agriculture
Administration Building (Main Building)
Room 228-W
1400 Independence Avenue, S.W.
Washington, D.C. 20250

✱ Faxed
✱ Emailed



BENJAMIN F. YALE
KRISTINE H. REED

APPENDIX A
TABLE OF PROVISIONS TO BE STAYED.

I. Modify the General Provisions as adopted as follows: (Delete text that is **struckout) as follows:**

PART 1000—GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS

1. SECTION 1000.40 is amended by removing and reserving paragraph (c)(1)(ii) and revising paragraph (d)(1)(i) to read as follows: § 1000.40 Classes of Utilization.

* * * * *

(c) * * *

(1) * * *

(ii) [Reserved]

* * * * *

(d) Class IV milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Butter, plastic cream, anhydrous milkfat, and butteroil; and

* * * * *

2. SECTION 1000.50 is amended by revising the last sentence of the introductory text and paragraphs (a), (b),

(c), (g), (h), (j), (l), (m), (n), (o), (p)(1), and (q)(3) and adding paragraph (q)(4) to read as follows: § 1000.50 Class prices, component prices, and advanced pricing factors.

~~*** The price described in paragraph (d) of this section shall be derived from the Class II skim milk price announced on or before the 23rd day of the month preceding the month to which it applies and the Class IV butterfat price announced on or before the 5th day of the month following the month to which it applies.~~

~~(a) Class I price. The Class I price per hundredweight shall be the adjusted Class I differential specified in § 1000.52 plus the higher of the advanced Class III or advanced Class IV prices calculated in paragraph (q)(4) of this section.~~

~~(b) Class I skim milk price. The Class I skim milk price per hundredweight shall be the adjusted Class I differential specified in § 1000.52 plus the advanced Class III or advanced Class IV skim milk price used in the calculation of the higher of the advanced Class III or advanced Class IV prices calculated in paragraph (q)(4) of this section.~~

~~(c) Class I butterfat price. The Class I butterfat price per pound shall be the adjusted Class I differential specified in~~

~~§ 1000.52 divided by 100, plus the advanced Class III or advanced Class IV butterfat price used in the calculation of the higher of the advanced Class III or advanced Class IV prices calculated in paragraph (q)(4) of this section.~~

~~* * * * *~~

~~(g) Class II butterfat price. The Class II butterfat price per pound shall be the Class IV butterfat price plus \$.007.~~

~~(h) Class III price. The Class III price per hundredweight, rounded to the nearest cent, shall be .965 times the Class III skim milk price plus 3.5 times the Class III butterfat price.~~

~~* * * * *~~

~~(j) Class IV price. The Class IV price per hundredweight, rounded to the nearest cent, shall be .965~~

~~times the Class IV skim milk price plus 3.5 times the Class IV butterfat price.~~

~~*****~~

(l) Class III and Class IV butterfat prices.

~~(1) The Class III butterfat price per pound, rounded to the nearest one-hundredth cent, shall be computed as follows:~~

~~(i) Compute a weighted average of the following prices:~~

~~(A) The U.S. average NASS survey price for 40-lb. block cheese reported by the Department for the month; and~~

~~(B) The U.S. average NASS survey price for 500-pound barrel cheddar cheese (38 percent moisture) reported by the Department for the month plus 3 cents;~~

~~(ii) Subtract 16.5 cents from the price computed pursuant to paragraph (l)(1)(i) of this section and multiply the result by 1.582;~~

(2) The Class IV butterfat price per pound, rounded to the nearest one-hundredth cent, shall be the U.S. average NASS AA butter survey price reported by the Department for the month less 11.5 cents, with the result divided by 0.82.

(m) Nonfat solids price. The nonfat solids price per pound, rounded to the nearest one-hundredth cent, shall be the U.S. average NASS nonfat dry milk survey price reported by the Department for the month less 14 cents.

(n) Protein price. The protein price per pound, rounded to the nearest one-hundredth cent, shall be computed by subtracting 16.5 cents from the price computed pursuant to paragraph (l)(1)(i) of this section and multiplying the result by 1.405;

(o) Other solids price. The other solids price per pound, rounded to the nearest one-hundredth cent, shall be the U.S. average NASS dry whey survey price reported by the Department for the month minus 14 cents, with the result divided by 0.968. The other solids price shall not be less than zero.

~~(p) ***~~

~~(1) Multiply .0005 by the weighted average price computed pursuant to paragraph (l)(1)(i) of this section and round to the 5th decimal place;~~

~~*****~~

(q) ***

(3) Calculate the advanced Class III and advanced Class IV butterfat prices as follows:

(i) The advanced Class III butterfat price shall be calculated by subtracting 16.5 cents per pound from a weighted average of the 2 most recent U.S. average NASS survey prices for 40-lb. block cheese and for 500-pound barrel cheddar cheese (at 38 percent moisture) plus 3 cents announced before the 24th day of the month, with the result multiplied by 1.582;

(ii) The advanced Class IV butterfat price shall be calculated by subtracting 11.5 cents from a weighted average of the 2 most recent U.S. average NASS AA butter survey prices announced before the 24th day of the month, with the result divided by 0.82.

(4) Calculate the advanced Class III and advanced Class IV prices as follows:

(i) The advanced Class III price shall be the sum of the value calculated pursuant to paragraph (q)(1) of this section multiplied by .965 plus the value calculated pursuant to paragraph (q)(3)(i) of this section multiplied by 3.5, rounded to the nearest cent.

(ii) The advanced Class IV price shall be the sum of the value calculated pursuant to paragraph (q)(2) of this section multiplied by .965 plus the value calculated pursuant to paragraph (q)(3)(ii) of this section multiplied by 3.5, rounded to the nearest cent.

II. Do not implement any of the provisions in the individual orders.