Admitted Not Received #34 ?

Testimony of Peter L. Hardin
Before the Upper Midwest Federal Milk Marketing Area hearing
June 26, 2001
Bloomington, Minnesota

My name is Peter L. Hardin. I live near Brooklyn, Wisconsin. I have edited and published *The Milkweed*, a monthly dairy marketing report for 22 years and provide subscribers with insights and information oftentimes unavailable elsewhere.

My testimony will focus on a general issue that relates to all six proposals discussed at this hearing, as well as USDA's current administration of the program. In my opinion, however, the problem of long-distance pooling is a national problem, not a regional problem. USDA would better serve the industry by holding a national hearing on pooling issues, not a series of regional hearings.

Starting early this year, I have written about the siphoning of Upper Midwest producers' incomes, due to huge increases of California milk associated with the Upper Midwest order. Dating back to October 2000, when this trend first accelerated, I estimate that Order 30 dairy farmers have lost between $11 and $12 million in income through the order, due to draining of resources by milk pooled from California ... and more recently, from Idaho. Absurdly, in April 2001, 268 million lbs. of California milk were pooled on the Upper Midwest order. That volume constituted 17% of all milk pooled on Order 30, and drained 17 cents per cwt. from the value of all other milk in the order.

This Grand Larceny has taken place when producer prices were at some of their all-time lowest net levels (when adjusted for inflation). Upper Midwest producers have struggled to pinch every penny in order to survive, while simultaneously, certain cooperatives have sidetracked between $11 and $12 million dollars from the revenue pool since October 2000. Table A, which follows, provides a monthly breakdown, starting with September 2000, of the dollar amounts and impact, per cwt. (on milk pooled in Order 30 other than California milk), extracted by California milk associated with the Upper Midwest pool.

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Table A.

Gross Value & Cost Per Cwt. of California Poolings on Order 30 Producers
September 2000 through May 2001

Month	California Draw*	Effect on other pooled milk**
September 2000	$ 68,600	less than one-half cent/cwt.
October 2000	290,680	-1.8 cents/cwt.
November 2000	969,540	-6.3 cents/cwt.
December 2000	1,092,240	-6.96 cents/cwt.
January 2001	1,572,810	-9.98 cents/cwt.
February 2001	1,681,680	-12.1 cents/cwt.
March 2001	2,090,400	-14.3 cents/cwt.
April 2001	2,390,400	-17.1 cents/cwt.
May 2001	1,614,700	-12.1 cents/cwt.

*** derived by multiplying California cwt. pooled on Order 30 by month's PPD.**
**** derived by dividing non-California pool milk into monthly dollar value drawn from Order 30 by California poolings.**

According to data I received from Order 30 last Friday, the months of April and May 2001 saw 33 and 35 million lbs. of milk from Idaho also pooled on Order 30. Those poolings further reduced those month's prices received by Order 30 producers by:

April: -3.2 cents/cwt.
May: -2.96 cents/cwt.

Clearly, Order 30 producers are losing critical revenue due to the pooling of California, and now Idaho, milk on the Upper Midwest order.

Having established the economic harm to Upper Midwest producers from pooling California milk, I'll now shift to the key point of my testimony. I would like to submit as

an exhibit to the hearing record a document from the files of the United States Department of Justice.

This document is the 1977 Consent Decree between Mid-America Dairymen, Inc. and the U.S. Department of Justice. Portions of that 24-year old Consent Decree remain in effect. Dairy Farmers of America succeeded Mid-America Dairymen and is legally obliged to comply with the Consent Decree.

I am no lawyer. I pose the following questions, or challenges to USDA personnel who will review this hearing record:

Is DFA's pooling of California milk on Order 30 a violation of the 1977 Consent Decree ... Part IV, Paragraph (C).

That portion of the Consent Decree reads:

"Defendant is hereby enjoined and restrained from:

"(C) qualifying milk for participating in federal milk order pools with a purpose of suppressing the uniform price paid to producers participating in a federal milk order pool in order to force, coerce or induce such producers who are not members of the defendant to join defendant or cease selling milk in competition with the defendant."

Part III of the 1977 Consent Decree raises additional constraints "in active concert" with DFA, such as Land O'Lakes and the National Farmers Organization. The Consent Decree places similar restrictions upon firms "in active concert" with DFA, through various business relationships and joint ventures.

DFA, Land O'Lakes and, to a far lesser degree, National Farmers Organization, the primary firms pooling California milk on Order 30.

Part IV, Paragraph (C) infers a bit of intent, in using the language, "...with a purpose of suppressing the uniform price paid to producers participating in a federal milk order pool." Obviously, the intent of DFA is hard to determine. But the net effect of all these poolings of California milk can create producer pay prices offered by DFA that exceed the value gained for sale of local milk. As proof, USDA should study DFA's pay price practices in the vicinity of the Melrose, Minnesota cheese plant that DFA acquired, late this spring, in a joint venture with Land O'Lakes, could be a clue as to where some of the money siphoned from the California poolings may be going.

In my opinion, it is USDA's duty to be intimately aware with the 1977 Consent Decree and possible violations thereof by DFA (and others) in its pooling of milk from

California on the Upper Midwest order. Whatever DFA's intent, the action is definitely "suppressing the uniform price paid to producers participating in a federal milk order pool ...."

In my opinion, it is USDA's duty to assure that ALL of the rules of the land are observed in the conduct of the federal milk order program. Just as USDA would not allow producers to be paid for their milk in counterfeit currency (a violation of Treasury Department rules), I feel it is USDA's duty to observe that binding rules and laws of the U.S. Department of Justice are enforced upon participants in the federal milk order program.

Is pooling of California milk by DFA, and certain other organizations, a violating of the binding portions of the 1977 Consent Decree? I challenge USDA to thoroughly research that question. In my opinion, USDA must operate the milk order program within the confines of all legalities. If USDA fails that duty, the next course will be either to the courts or to Congress.

TABLE B.

Total Milk, California Poolings & Economic Impact
On the Upper Midwest Federal Milk Marketing Order
January 2000 – May 2001

A Month	B Total Milk*	C CA Milk*	D PPD	E C X D	F E/(A-B)
Jan. 2000	2,432.6	8.4	$ .43	$ 36,120	
Feb.	2,268.7	8.1	.56	45,360	
March	2,260.6	8.7	.64	56,680	
April	2,068.8	9.4	.74	69,560	
May	2,085.0	9.4	.90	84,600	
June	1,933.1	8.8	.97	85,360	
July	1,917.2	8.0	.70	56,000	
Aug.	1,852.0	9.0	.84	75,600	
Sept.	1,708.0	9.8	.70	68,600	
Oct.	1,637.7	33.8	.86	290,680	1.8 cents/cwt.
Nov.	1,594.0	67.8	1.43	969,540	6.3 cents/cwt.
Dec.	1,657.0	88.8	1.23	1,092,240	6.96 cents/cwt.
Jan. 2001	1,728.7	152.7	1.03	1,572.810	9.98 cents/cwt.
Feb.	1,578.8	191.1	.88	1,681,680	12.1 cents/cwt.
March	1,725.7	268	.78	2,090,400	-14.3 cents/cwt.
April	1,687.2	288.0	.83	2,390,040	17.1 cents/cwt.
May	1,600.0	241	.67	1,614,700	-12.1 cents/cwt.

* Million lbs.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Civil Action No. 73 CV 661-W-1
MID-AMERICA DAIRYMEN, INC., Defendant.	)	Filed: May 28, 1976 Entered: May 17, 1977

FINAL JUDGMENT

Plaintiff, United States of America, having filed its Complaint herein on December 27, 1973, and defendant, Mid-America Dairymen, Inc., having appeared by its attorneys and having filed its Answer, by their respective attorneys, having consented to the entry of this Final Judgment, prior to the taking of any testimony, without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or admission by either party as to any issue of fact or law herein:

NOW, THEREFORE, prior to the taking of any testimony, and without trial or adjudication of any issue of law or fact herein, and upon consent of the parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

I

This Court has jurisdiction over the subject matter of this action, and of the parties hereto. The Complaint states claims upon which relief may be granted under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. §§ 1 and 2), commonly known as the Sherman Act.

as used in this Final Judgment:

(A) "Ascertainable quantity" means a percentage of the normal requirements of milk processed in an identified plant or the milk production of an identified producer or group of producers;

(B) "Base" means an allocation by defendant, expressed in pounds of milk per delivery period, possessed by a member under a Class I Base Plan;

(C) "Class I Base Plan" means a procedure or plan for the distribution of marketing proceeds to defendant's members, or a group thereof, whereby each such member is assigned or otherwise acquires a stated Base that entitles the member to receive a higher return for quantities of milk produced and marketed through defendant within the Base than for quantities in excess of the Base;

(D) "Competitor of defendant" means a person selling or offering to sell milk or other dairy products, including, but not limited to, an individual producer, a group of producers, a cooperative or a proprietary firm;

(E) "Federal milk marketing order" means the regulations, rules of practice and procedures issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 601 et seq.), regulating the handling of milk;

(F) "Member" means a producer who has a membership and marketing agreement with defendant and whose milk production is marketed by defendant;

(G) "Milk" means raw Grade A milk produced by cows;

(H) "Milk hauler" means a person, not an employee of defendant, who owns or operates a truck and transports milk;

(I) "Milk Sales Agreement" means a contract between defendant and a person operating a fluid milk processing and packaging plant wherein the buyer agrees to purchase from defendant a specified or ascertainable quantity of milk;

(J) "Person" means any corporation, partnership, association, individual, cooperative, or other business or legal entity;

(K) "Plant" means the land, buildings, facilities and equipment constituting a single operating unit or establishment in which milk is or has been received, transferred, reloaded, processed, or manufactured;

(L) "Producer" means any person engaged in the production of milk.

III

The provisions of this Final Judgment shall apply to defendant and to each of its directors, officers, agents, employees, subsidiaries, successors, assigns and their subsidiaries, and to all persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV

Defendant is hereby enjoined and restrained from:

(A) using threats or coercion to induce any producer to execute or refrain from terminating a membership and marketing agreement with defendant or to deliver milk to defendant;

(B) asserting or threatening to assert any claim or cause of action against a member or former member based upon the actual or proposed termination by such member or former member, individually or jointly with other producers, of a membership and marketing agreement with defendant after written notice within the time specified in the membership and marketing agreement;

(C) qualifying milk for participation in federal milk marketing order pools with a purpose of suppressing the uniform price paid to producers participating in a federal milk marketing order pool in order to force, coerce or induce such producers who are not members of defendant to join defendant or to cease selling milk in competition with defendant;

(D) entering into or enforcing any contract or agreement with another cooperative or association of producers to qualify milk for participation in federal milk marketing order pools with a purpose of suppressing the uniform price paid to producers participating in a federal milk marketing order pool in order to force, coerce or induce such producers who are not members of defendant to join

defendant or such other cooperative or association or to cease selling milk in competition with defendant or such other cooperative or association;

(E) Maintaining or entering into any agreement with another person, except an employee or milk hauler performing services for defendant, that restricts in any way:

(1) the solicitation by such other person of any member of defendant to terminate its membership and marketing agreement with defendant;

(2) the solicitation by defendant of any producer to become a member of defendant;

(3) the territory in which defendant or such other person seeks to obtain supplies of milk;

(F) requiring as part of a Class I Base Plan that a member or former member who transfers Base not compete in the sale of milk unless such requirement is limited to competition with the transferee of Base and to a period not exceeding two (2) years following the transfer of Base.

V

(A) Defendant is hereby ordered for one (1) year from the entry of this Final Judgment to allow any member to terminate its membership and marketing agreement at any time by giving defendant at least thirty (30) days written notice.

(B) Defendant is hereby enjoined and restrained, after one year from the entry of this Final Judgment, from entering into or enforcing any membership and marketing agreement with any member unless such agreement can be

[illegible] written notice by the member at least thirty (30) days prior to such agreement's anniversary date.

(C) If, following the expiration of the time period provided in Paragraph V(A), the anniversary date of a membership and marketing agreement becomes the date prior to which thirty (30) days written notice for the termination of such agreement must be given, defendant is hereby ordered within ninety (90) days of the date the change in procedure becomes effective to notify each member who is a party to such an agreement of the anniversary date thereof; this Paragraph V(C) of this Final Judgment shall expire after five years from the entry thereof.

(D) If, following the expiration of the time period provided in Paragraph V(A), the anniversary date of a membership and marketing agreement becomes the date prior to which thirty (30) days written notice for the termination of such agreement must be given, defendant is hereby ordered for five (5) years from the entry of this Final Judgment to:

(1) allow a producer upon entering into a membership and marketing agreement with defendant or upon executing a new membership and marketing agreement with defendant at the proper time for termination of an existing agreement to select any anniversary date desired by the producer notwithstanding the date upon which the membership and marketing agreement is executed. Defendant shall only be required to allow a producer to select an anniversary date once under this Paragraph V.(D)(1);

(2) allow a producer, following a proper notice of termination of a membership and marketing agreement, to extend the membership and marketing agreement to any date, within one (1) year, selected by the withdrawing producer, and market on a non-discriminatory basis the milk production of such producer; provided, however, defendant shall not be required to grant such an extension if defendant has terminated the membership and marketing agreement for reasons of defendant's inability or difficulty in performing its marketing duties under the membership and marketing agreement.

VI

Defendant is hereby enjoined and restrained from:

(A) entering into or enforcing any contract or agreement with any milk hauler that requires the milk hauler to transport milk exclusively for defendant or its members;

(B) requiring as a condition for the approval of an assignment of a hauling contract or other conveyance of the business of a milk hauler that any milk hauler not transport milk in competition with any other milk hauler or with defendant.

VII

Defendant is hereby enjoined and restrained from:

(A) entering into or enforcing any Milk Sales Agreement containing a term in excess of one (1) year;

(B) entering into or enforcing any Milk Sales Agreement unless the buyer had the opportunity to agree to

purchases from defendant under such Agreement any greater specified or ascertainable quantity of milk than is offered for sale by defendant; provided, however, defendant may require the buyer to receive milk in truckload quantities;

(C) entering into or enforcing any Milk Sales Agreement unless such Agreement provides that in the event defendant, during the term of such Agreement, increases the price of milk or changes the formula or procedure for ascertaining the price of milk sold under such Agreement resulting in an increase in the price, the buyer may discharge such Agreement on or after the effective date of the price increase by giving written notice to defendant at any time within twenty (20) days after the announcement of such price increase or five (5) days prior to the effective date of such price increase, whichever is later;

(D) discriminating or threatening to discriminate against any buyer of milk on account of its actual or proposed purchase of milk from a competitor of defendant;

Provided, however, nothing in this Paragraph VII shall be construed to limit or affect the application of the anti-trust laws to Milk Sales Agreements.

VIII

(A) Within two (2) years of the entry of this Final Judgment, defendant is hereby ordered to sell to any qualified buyer the assets presently located at its plants in Aurora,

Missouri, Ottawa, Kansas, and Bethany, Missouri, described in Exhibit A attached hereto. For purposes of this Paragraph, a "qualified buyer" shall be any person who seeks to purchase as a unit the assets at any of the aforementioned plants and who intends after such purchase to operate a receiving or transfer station for milk or a milk manufacturing plant.

(B) The sale of any of the plants described in this Paragraph VIII shall require the prior approval of plaintiff. In the event plaintiff objects to the proposed sale, the sale shall not be consummated until a showing that the buyer meets the requirements of this Paragraph VIII has been made to this Court.

(C) Until divestiture is completed, defendant will maintain in good condition and repair the assets located at each of the plants in Aurora, Missouri, Ottawa, Kansas, and Bethany, Missouri, and replace any asset removed from any of the plants following the entry of this Final Judgement with comparable assets prior to the closing of any sale.

(D) Beginning ninety (90) days after the entry of this Final Judgment and continuing every six (6) months until all the assets described in this Paragraph VIII are divested, defendant shall furnish a written report to plaintiff describing the steps taken to accomplish divestiture, the assets sold and remaining to be divested, the assets removed from any of the plants, and the terms and conditions of any offers for the purchase of such assets.

IX

(A) For five (5) years from the entry of this Final Judgment, defendant shall give notice to plaintiff at least thirty (30) days prior to the closing date of any transaction for the purchase, consolidation, acquisition of control, or lease (except for the renewal of an existing lease) of any plant, and such notice shall fully describe the present and projected operation of the plant to be acquired and the terms and conditions of the proposed transaction.

(B) For five (5) years from the entry of this Final Judgment, defendant is enjoined and restrained from purchasing, consolidating with, acquiring control of, or leasing (except for the renewal of an existing lease) any plant where the effect of such transaction may be substantially to lessen competition, or to tend to create a monopoly.

(C) For one (1) year following the purchase, consolidation, acquisition of control, or lease (except for the renewal of an existing lease) of any plant, defendant is hereby ordered to continue to receive the milk of any competitor of defendant who is delivering milk to such plant on or within sixty (60) days prior to such transaction and who desires to continue such delivery; provided, however, defendant may require such competitor to execute a marketing agreement terminable by the competitor upon at least thirty (30) days written notice at any time.

X

Defendant is hereby enjoined and restrained, for a period of nine (9) years from the entry of this Final Judgment, from participating in any cooperative, association of producers or organization of cooperatives whose business activities include acquiring an option to purchase milk received at a milk manufacturing plant not regulated by a federal milk marketing order, or to purchase milk from any producer or group of producers shipping milk to such a plant, unless such cooperative, association of producers or organization of cooperatives meets the following conditions:

(A) that any person operating a milk manufacturing plant not regulated by a federal milk marketing order may enter into a contract, on a non-discriminatory basis, to grant an option to purchase milk to establish or maintain a reserve supply of milk if

(1) the milk received at the manufacturing plant meets similar standards of quality and quantity as are prescribed for other quantities of milk subject to such a purchase option; and

(2) said person is in competition for the procurement of raw milk with a person that has a contract to supply milk to said cooperative, association of producers or organization of cooperatives;

(B) that there shall be no discrimination against any person that receives milk from a competitor of defendant;

(C) that any person shall be permitted to dispose of any milk subject to the purchase option if the purchase option is not exercised at least twenty-four (24) hours prior to the time the milk is picked up from the farm to whomever, wherever and upon whatever terms and conditions it chooses, and the cooperative, association of producers or organization of cooperatives shall not discriminate against any person that resells milk subject to a purchase option not exercised;

(D) that any cooperative or association of producers whose business activities are within the provisions of section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, or section 6 of the Clayton Act, 7 U.S.C. § 17, may participate in said cooperative, association of producers or organization of cooperatives on an equivalent and non-discriminatory basis;

(E) that any participating cooperative shall be permitted to resell milk obtained through said cooperative, association of producers or organization of cooperatives to whomever, wherever and on whatever terms and conditions it chooses;

(F) that no contract or agreement entered into with said cooperative, association of producers or organization of cooperatives may exceed a term of one (1) year;

(G) that said cooperative, association of producers or organization of cooperatives shall obtain the option for the purpose of establishing and maintaining a reserve

supply of milk to fulfill the requirements of participating cooperatives and for that purpose exclusively;

(E) that the persons receiving orders from participating cooperatives and directing the shipment of milk upon which a purchase option has been exercised shall be independent of and shall not be employed by any participating person; and all reports of shipments of milk will not be made until the completion of the month, and shall be made at the same time to all participating persons;

Provided, however, the terms of this Paragraph X shall not be applicable to any marketing agreement with the Secretary of Agriculture entered into under the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 601 et seq.).

XI

Defendant is enjoined and restrained from joining, contributing anything of value to, or participating in, any organization or association which directly or indirectly engages in or enforces any act which defendant is prohibited by this Final Judgment from engaging in, or enforcing, or which is contrary to or inconsistent with any provision of this Final Judgment.

XII

(A) Defendant is enjoined and restrained from adopting, adhering to, enforcing, or claiming any rights under any by-law, rule or regulation which is contrary to or inconsistent with any of the provisions of this Final Judgment.

(B) Defendant is ordered to file with plaintiff annually for a period of ten (10) years, on or before June 30, a report setting forth the steps taken by its board of directors to advise its officers, directors, employees, members and all appropriate committees of its and their obligations under this Final Judgment.

XIII

(A) Defendant is ordered to mail or otherwise furnish within ninety (90) days after the entry of this Final Judgment a copy thereof (excluding Exhibit A) to each of its members and employees, to each milk hauler transporting milk for defendant, and to each person purchasing milk from or selling milk to defendant or any organization for which defendant acts as marketing agent, and within one hundred fifty (150) days from the aforesaid date of entry to file with the Clerk of this Court an affidavit setting forth the fact and manner of compliance with Paragraph XIII.

(5) Defendant is further ordered and directed to publish, in a publication circulated to all its members, a copy of this Final Judgment once each year for four (4) years on or about the anniversary date of entry of this Final Judgment, and to furnish a copy of this Final Judgment (except that Exhibit A need not be furnished unless specifically requested) to any person upon request.

XIV

For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege:

(A) duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant made to its principal office, be permitted (1) access, during the office hours of defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or in the control of defendant relating to any of the matters contained in this Final Judgment, and (2) subject to the reasonable convenience of defendant without restraint or interference from defendant, to interview officers, or employees of defendant, each of whom may have counsel present, regarding any such matters;

(B) defendant, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such reports

... giving to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be requested.

No information obtained by the means provided in this Paragraph XIV shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of plaintiff, except in the course of legal proceedings to which the United States of America is party, or for the purpose of determining or securing compliance with this Final Judgment or as otherwise required by law.

XV

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for further orders and direction as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XVI

This Court finds that the entry of this Final Judgment is in the public interest.

/s/ John W. Oliver
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
May 17, 1976.