

**In re: KREIDER DAIRY FARMS, INC.
94 AMA Docket No. M-1-2.
Decision and Order filed August 12, 1997.**

Milk – Milk marketing order – Producer handler exemption.

Petitioner challenged the decision of the Market Administrator for the New York-New Jersey Marketing Area denying Petitioner producer-handler status and exemption from making payments to the producer-handler settlement fund. Judge Bernstein found that it was feasible for Ahava Dairy Products, Inc., one of Petitioner's customers, to obtain fluid milk products from at least one other handler during Petitioner's periods of short production. Judge Bernstein concluded Petitioner was able to reduce its surplus, was "riding the pool," and was receiving an unearned economic benefit from a producer-handler exemption. Based on this conclusion Judge Bernstein upheld the Market Administrator's decision and dismissed Petitioner's petition.

Sharlene A. Deskins, for Respondent.
Marvin Beshore, Harrisburg, PA, for Petitioner.
Decision issued by Edwin S. Bernstein, Administrative Law Judge.

This is a proceeding under section 15(A) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 608c(15)(A), and the Federal New York-New Jersey Milk Marketing Order (Order 2) (7 C.F.R. Part 1002). Petitioner, Kreider Dairy Farms, Inc. (Kreider), is a dairy farm operation which produces and processes kosher fluid milk which it sells in the marketing area covered by Order 2. Kreider filed a Petition on December 23, 1993, challenging the decision of the Order 2 Market Administrator to regulate it as a handler operating a partial pool plant. Kreider maintained that it was a producer-handler under the regulations and was accordingly exempt from paying into the producer settlement fund. The Petition requested a refund, with interest, of amounts paid into the fund.

I presided over the initial hearing on the Petition on December 14, 1994. On March 20, 1995, I issued an Initial Decision and Order upholding the Petition and directing a refund to Kreider of all amounts charged pursuant to the contested imposition of the regulations, without interest. The Market Administrator appealed to the Judicial Officer, and Kreider filed a cross-appeal seeking a refund of interest. The Judicial Officer reversed the Initial Decision and Order and dismissed the Petition. Petitioner appealed to the United States District Court for the Eastern District of Pennsylvania. On cross-motions for summary judgment, the Court ruled that neither the plain language of Order 2 nor its promulgation history support a finding that Kreider should be denied producer-handler status. Nor did it find that Departmental precedent supported such a finding. It was, however, unable to determine from the record whether Kreider would receive an unearned economic benefit from producer-handler status. The action was, therefore, remanded for further fact finding. Specifically, the court stated:

[T]his action is remanded to the Secretary to hold such further proceedings

necessary to determine whether in fact Kreider is “riding the pool.” To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.

Kreider Dairy Farms, Inc. v. Glickman, 1996 WL 472414, *9 (E.D. Pa. 1996).

A hearing was held in Washington, D.C. on April 23, 1997, to receive evidence on the remanded issue. Petitioner was represented by Marvin Beshore of Harrisburg, Pennsylvania. Respondent was represented by Sharlene Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, D.C.

The parties filed Proposed Findings of Fact, Proposed Conclusions of Law, and Briefs on June 12, 1997, and Reply Briefs on June 23 and 24, 1997. All proposed findings, proposed conclusions, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

In this opinion, “Tr. 1997” refers to the transcript of the April 23, 1997, hearing; “Tr. 1994” refers to the transcript of the 1994 hearing; “RX 1997” refers to the numbered exhibits that Respondent introduced at the 1997 hearing; “RX 1994” refers to the numbered exhibits that Respondent introduced at the 1994 hearing; and “PX” refers to the exhibits that Petitioner introduced at the 1994 hearing.

Findings of Fact

1. Petitioner, Kreider Dairy Farms, Inc., is a Pennsylvania Corporation with its principal place of business at 1461 Lancaster Road, Manheim, Lancaster County, Pennsylvania 17545 (PX 2; Tr. 1994 at 21-22).

2. Petitioner’s facilities are physically located within the marketing area of Federal Milk Marketing Order Number 4 (7 C.F.R. Part 1004), which regulates the marketing of milk in the Middle Atlantic marketing area (Tr. 1994 at 21-25). Petitioner has since its inception been a producer-handler under Order 4--that is, a dairy farm enterprise involved in the production, processing, and sales of fluid milk products. As a producer-handler under Order 4, Petitioner is exempt from accounting to the market order pool for the minimum class value of its utilization of milk and at the same time is not entitled to participate in the pool as a producer with respect to the minimum producer blend price (Tr. 1994 at 21-26, 51-52).

3. In November 1990, Petitioner began direct sales and distribution of kosher milk products including whole milk, flavored milk, low fat milk, and skim milk to Ahava Dairy Products (Ahava), in Brooklyn, New York. Ahava is located in the New York-New Jersey marketing area which is covered by Milk Marketing Order Number 2 (PX 1, 3 & 5; Tr. 1994 at 26-28, 140-41).

4. Ahava is a distributor of kosher food products to wholesale and retail customers in and around New York City (Tr. 1994 at 54, 71-72).

5. Ahava sells milk under two labels, "Ahava" and "New Square." The "New Square" label has a higher level of kosher certification than the "Ahava" label, and has stricter processing requirements.

6. Kreider is an all kosher plant which produces milk suitable for certification by the bais din of New Square (Tr. 1994 at 58-59).

7. Under the supervision of rabbis, Kreider processes and packages the milk into containers at its facilities in Lancaster County and delivers the products in its trucks to Ahava's warehouse in Brooklyn (Tr. 1994 at 56-59, 73-74, 80-86). The milk is packaged by Petitioner in accordance with Ahava's instructions under the "New Square" label or the "Ahava" label (PX 14; Tr. 1994 at 57, 76). Ahava either sells the milk retail at its place of business or delivers the milk to between 800 and 1100 customers, which consist of retail stores, restaurants, and schools (Tr. 1994 at 72, 76-77).

8. At various times between 1991 and 1996, Ahava also received milk from Farmland Dairies, Mason-Dixon Farms, Degraff Dairies, and Lewis County Dairy. At all times Ahava was supplied by at least one producer other than Kreider (RX 1997: 1).

9. At the time of the 1997 hearing, Kreider had ceased doing business with Ahava because Ahava owed Kreider \$300,000, and Ahava was planning to file for bankruptcy (Tr. 1997 at 101).

10. In December 1990, the Market Administrator for Order 2 notified Petitioner that, as a result of its sales to Ahava, it had a potential obligation to the producer settlement fund (PX 1).

11. In August 1992, the Market Administrator for Order 2 notified Petitioner that its sales of fluid milk products to other handlers for sale or distribution in Order 2 caused it to be regulated as a handler operating a partial pool plant pursuant to 7 C.F.R. § 1002.29(b) (PX 7; Tr. 1994 at 135-36). On that basis, Petitioner was billed beginning with November 1991 deliveries for all volumes of its fluid milk products distributed in the Order 2 market area at the rate established under Order 2 (Tr. 1994 at 138-41).

12. In order to be designated a producer-handler by the Market Administrator under the Order 2 regulations, a handler must have under its complete and exclusive control the production, processing, and distribution of milk, and operate that business as a self-contained, integrated operation (Tr. 1997 at 17).

13. It is the policy of the Order 2 regulations to exempt producer-handlers from pooling and milk pricing provisions of the Order 2 regulations because: (a) they have a minimal effect on the marketplace; (b) they sell only their own production of milk; and (c) they do not rely upon the market to carry their surplus milk supplies (Tr. 1997 at 18).

14. The Order 2 regulations do not define "surplus" or establish any criteria for a minimum or maximum surplus required of producer-handlers (Tr. 1997 at 78).

15. Respondent defines "surplus" as any milk in excess of Class I milk

utilizations, as measured by bulk sales (Tr. 1997 at 19).

16. Class I milk products consist of whole milk, low fat milk, skim milk, and other types of fluid milk products (Tr. 1997 at 41).

17. Class III milk is used in products such as butter, cheese, and evaporated milk (Tr. 1997 at 42).

18. Surpluses exist due to seasonal changes in milk production. Dairy cows produce the most milk in the spring and the least amount in the fall. In order to produce enough milk during periods of lower production, producers must operate at a capacity which causes a surplus during periods of higher production (Tr. 1997 at 44-46).

19. Between August 1994 and October 1996, Kreider had an average monthly surplus which was lower than the average monthly surplus of producer-handlers in Order 2 (RX 1997: 8, 11, 13).

Discussion and Conclusion

The remand ordered by the District Court for the Eastern District of Pennsylvania was prompted by language in the Judicial Officer's Decision and Order which stated that Kreider would receive an unearned economic benefit from a producer-handler exemption. The District Court found that the presence of an economic benefit, as explained by the Judicial Officer, was not supported by the record. It explained the insufficiency as follows:

This court finds that this purported economic benefit is not supported by the record before it. In its Amicus brief, Ahava states that in order for Kreider's milk to receive Ahava's certification that the milk is kosher, there must be "direct daily supervision and control over the production and processing facilities by appropriate rabbinical authorities" and that such supervision is "extensive." (Amicus Ahava's Mem. Supp. Pl. Mot. Summ. J. at 3 & 3 n. 2.) Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production. [FN 4]

FN 4. For example, Ahava has determined that "Farmland Dairies, a major fluid milk processor in the Northern New Jersey-New York area, although entirely owned by a family of the Jewish faith . . . was unacceptable as a source of kosher milk" to New York's ultra-orthodox Jewish community, which makes up Ahava's customer base. (Amicus Ahava's Mem. Supp. Pl. Mot. Summ. J. at 5)

If the record cannot support the economic justification behind the

Defendant's action, then it appears arbitrary, especially since, as noted previously, the language of Order 2 is ambiguous and the MA's action is not clearly supported by the promulgation history of Order 2 or departmental interpretation. . . . Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is "riding the pool." To this end, *the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.*

Kreider Dairy Farms, Inc. v. Glickman, 1996 WL 47214, *9 (emphasis added).

Upon consideration of the evidence submitted during the initial hearing and during the hearing following remand, I find that it is feasible for Ahava to turn to other handlers in periods of Kreider's short production.

Petitioner makes a number of arguments relating to the validity of Respondent's economic benefit argument. For example, it argues that the constraints being imposed should be established through rulemaking. In addition, Petitioner places a great deal of emphasis on the fact that it has no control over Ahava's other sources of supply and should, therefore, not be penalized on that basis. The issue presented here, however, is a very narrow one. The Court remanded solely to make a factual determination as to whether Petitioner is "riding the pool." To the extent Petitioner's legal arguments fall beyond the scope of this narrow factual issue, they have not been considered.

Although the regulations do not define "riding the pool," the Judicial Officer explained the benefit as follows:

Petitioner avoids producing a great deal of surplus milk. That is, Petitioner does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, Petitioner can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying Petitioner's milk. If a producer-handler could turn over its distribution function to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production.

In re Kreider Dairy Farms, Inc., 54 Agric. Dec. at 847-48.

The record is clear that Ahava received milk from sources other than Kreider. What is less clear is whether all of the milk received from the other producers was kosher certified, and therefore, directly substitutable for Kreider's milk. The

District Court pointed out that Ahava had special requirements which other producers may not have been able to meet. Although there was conflicting evidence regarding the kosher status of at least one of Ahava's other suppliers, the greater weight of the evidence suggests that Ahava only sold kosher milk, and accordingly Ahava only received kosher milk.

Ahava's owner, Moise Banayan, testified during the 1994 hearing that Ahava received milk products from Farmland (Tr. 1994 at 62, 65), and Kreider's records show purchases from Farmland between January 1991 and September 1995 (RX 1997: 1). Mr. Banayan also testified, however, that milk produced at Farmland's plant in Wallington, New Jersey was not all kosher, and, therefore, could not be marketed under the New Square label (Tr. 1994 at 60). In addition, the District Court noted that Farmland's milk was unacceptable to the ultra-orthodox Jewish community, which makes up Ahava's customer base. *Kreider, supra at* *9. There is no indication, however, that Ahava distributed anything other than kosher products. When Mr. Banayan was asked what business he was in, he stated that he owned "a distribution company of kosher food products" (Tr. 1994 at 54). No reference was ever made to any non-kosher products being distributed by Ahava.

Kreider's general manager, Richard Shellenberger, testified that Ahava imposed requirements for the New Square label that were stricter than those imposed by Kreider's previous kosher customer (Tr. 1994 at 84-86). This leads to the conclusion that there are varying levels of kosher certification. Ahava distributed under two different labels--"Ahava" and "New Square." The implication is that the "Ahava" label had lower requirements for kosher certification, which Farmland was able to meet.

Kreider primarily sold milk to Ahava under the "New Square" label, but also supplied some milk for the "Ahava" label. Although Kreider would not be able to rely on Farmland to meet its needs in supplying milk for the "New Square" label, it could rely on this milk to lessen its burden of supplying the "Ahava" label. There was no evidence presented with respect to the level of certification of milk supplied by other producers. Since Ahava only distributed kosher milk, the other producers, like Farmland, would have at least been able to supply the Ahava label. It was, therefore, feasible for Ahava to turn to Farmland, as well as other producers during periods of short production.

Petitioner argues that the data presented by Respondent fails to show a "consistent, direct relationship between Kreider's sales to Ahava, Kreider's surplus milk sales, and Ahava's purchases from other sources" (Petitioner's Brief at 13). The question presented by the District Court, however, was whether it was *feasible* for Ahava to turn to other producers. Accordingly, it is not necessary that any sort of causal nexus actually be shown. It is enough that Ahava could obtain milk from such other sources if Kreider could not meet Ahava's needs.

Furthermore, during the relevant time period, Kreider did maintain an annual surplus that was lower than the average of producer-handlers in Order 2. Between

August 1994 and October 1996, the five largest producer-handlers in Order 2 had an average monthly surplus that was 30.78% of total farm production (RX 11); and the three smallest producer-handlers in Order 2 had an average monthly surplus of 25.07% (RX 13). For the same twenty-seven month period, Kreider had an average monthly surplus of 13.85% (RX 8).

Although there are no requirements as to the amount of surplus a producer-handler must have, an inference can be made that Kreider was able to reduce its surplus because of its ability to rely on other producers to meet Ahava's needs. As such, Kreider was "riding the pool," and receiving an unearned economic benefit. Accordingly, the decision of the Market Administrator to deny Kreider producer-handler status must be upheld and the petition must be denied.

Order

The petition is dismissed.

Pursuant to the Rules of Practice, this Decision and Order shall become final and effective without further procedure thirty-five (35) days after service upon the parties unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service, as provided in section 900.65 of the Rules of Practice (7 C.F.R. § 900.65).
