



Commonwealth of Pennsylvania

Milk Marketing Board
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Official General
Order No. A-911 (CRO2)

Posted: November 6, 2002
Effective: December 1, 2002

**COST REPLACEMENT ORDER FOR THE
EAST CENTRAL MILK MARKETING AREA, AREA 2**

NOW, this 6th day of November, 2002, the Commonwealth of Pennsylvania, Milk Marketing Board, issues this official general order pursuant to the authority conferred by the Milk Marketing Law, 31 P.S. §§ 700j-101 – 700j-1204. This order will become effective at 12:01 a.m. on December 1, 2002.

**SECTION A
INCORPORATION**

The attached Findings of Fact, Conclusions of Law, Schedules I and II, and Attachments are incorporated herein by reference as though fully set forth in this order.

**SECTION B
SCOPE**

(a) The processing, packaging, and delivery costs, container costs, ingredient costs, shrinkage and net profit and loss on sales of bulk milk and bulk cream costs, and and in-store handling costs adopted by the Board in this order shall replace the costs in these categories embodied in Official General Order A-911 (CRO1) and will be incorporated into the wholesale and retail prices of Class I price-controlled packaged products sold in Milk Marketing Area No. 2, as defined in Section B of Official General Order A-911. Wholesale and retail prices will be adjusted as well by the increase in labor, insurance, and utility costs that the Board adopted in this order.

(b) Wholesale and retail prices for Class II price-controlled packaged products sold in Milk Marketing Area No. 2 will reflect the costs adopted in this order

(c) The rate of return to dealers is maintained at 3.5%. The rate of return to retailers is maintained at 2.7%.

SECTION C
EFFECTIVENESS OF OFFICIAL GENERAL ORDER A-911

All parts of Official General Order A-911 not inconsistent with Section B (relating to scope) continue in effect. This order supersedes Official General Order A-911 (CRO1).

PENNSYLVANIA MILK MARKETING BOARD

Beverly R. Minor, Chairwoman

Luke F. Brubaker, Member

Barbara A. Grumbine, Consumer Member

Date: November 6, 2002

FINDINGS OF FACT AND CONCLUSIONS OF LAW
COST REPLACEMENT HEARING FOR MILK MARKETING AREA NO. 2
OCTOBER 2, 2002

I. FINDINGS OF FACT

A. Procedural History

1. On October 2, 2002, the Pennsylvania Milk Marketing Board (Board) conducted a hearing for Milk Marketing Area No. 2 to consider cost replacement pursuant to Section B of Official General Order A-911.

2. Notice of the hearing was published at 32 Pennsylvania Bulletin 4289 on August 31, 2002, with a correction published at 32 Pennsylvania Bulletin 4791 on September 28, 2002. Notice was also mailed to all interested parties by means of Bulletin No. 1317 dated August 16, 2002, with a correction mailed to all interested parties by means of Bulletin No. 1321 dated September 18, 2002. The hearing notices enumerated the scope of evidence that the Board would receive. (PMMB Exhibits 1, 2, 3, and 4)

B. Validity of Dealer Cross-Section

3. The dealer cross-section utilized by both Board Staff and the Area 2 Milk Dealers (Dealers), the only parties to present evidence of dealer costs, consisted of Rosenberger's Dairies, Tuscan/Lehigh Valley Dairies (Schuylkill Haven), and Clover Farms Dairy. (Staff Exhibit 1)

4. Clifford Ackman, appearing on behalf of Board Staff as an expert in milk statistics, testified that the cross-section dealers were representative of dealers doing business in Area 2 because the percentage of milk types for the cross-section to overall sales are quite similar and they represent the types of customers, delivery systems, and container sizes. Carl Herbein, testifying on behalf of the Dealers as an expert in milk cost accounting, agreed that the cross-section was representative.

C. Dealer Costs and Rate of Return

5. Board Staff and Dealers presented concurring evidence of processing, packaging, and delivery costs of \$0.1454 per point for the year 2001. (Staff Rebuttal Exhibit 2, Exhibit D3) Based on the uncontroverted evidence, the Board finds it appropriate to replace the processing, packaging, and delivery costs in the current order with \$0.1454 per point.

6. Board Staff and Dealers presented identical evidence of ingredient costs, with the exception of flavored milk and flavored reduced fat milk. (Staff Exhibit 3, Exhibit D4) The difference is attributable to the fact that Board Staff used April 2002 costs while Dealers used August 2002 costs. David DeSantis, testifying for Board Staff as an expert in milk accounting, explained that Board Staff used the most current invoices

at the time of their audit, but did not have the resources to gather information up until the day of the hearing. Mr. Herbein testified that the Dealers gathered their data from actual invoices as of July/August 2002. Mr. Herbein also testified that the data and documentation were shared with Board Staff within a week or two of the initial exhibit submission date.

Board Staff and Dealers also provided an identical ingredient cost for eggnog of \$0.1168 per pound. The Board stated in Finding of Fact 6 of Official General Order A-911 (CRO1)

Section 802 of the Milk Marketing Law (Law), 31 P.S. § 700j-802, provides that “the board shall fix, by official order,” minimum wholesale and retail prices for milk. Section 103 of the Law defines “milk” to include “fluid milk.” The new federal milk marketing order (7 CFR §§ 1000 – 1139) classifies eggnog as a fluid milk product. Fluid milk product has been defined for the Board's purpose as meeting the definition included in the federal milk marketing orders. . . . The Board recognizes its duty to fix prices of milk as set forth in the Law. The Board finds that eggnog meets the definition of milk and, therefore, a minimum price shall be fixed for eggnog. The Board further finds that the minimum price for eggnog shall be set at the next cost replacement hearing for Area 2.

Mr. Herbein testified that the ingredient cost for eggnog arrived at by Dealers and Board Staff reflected the cost of the ingredients for the eggnog that is manufactured and sold in Area 2. However, it was Mr. Herbein's opinion that the eggnog cost did not reflect the cost of all the eggnog being sold in Area 2. He explained that the cross section dealers were converting from a fresh eggnog to a long shelf life eggnog that was being purchased from other handlers, but did not know the relative percentages of manufactured versus bought. Mr. Herbein recommended that an as-if manufactured calculation be adopted for setting minimum eggnog prices at future cost replacement hearings.

The Board finds that the ingredient costs as presented by Board Staff in Staff Exhibit 3 shall be adopted and replace the ingredient costs in the existing order. In adopting Staff's cost for flavored milk and flavored reduced fat milk, the Board makes no adverse finding regarding Mr. Herbein's credibility, but rather finds Staff's testimony more persuasive. The Board also finds that eggnog shall be priced based on the methodology and ingredient cost shown by Mr. DeSantis in the Staff Exhibits. However, the Board also finds that, due to the nature of the eggnog market, at future cost replacement hearings it would be appropriate to present an eggnog cost based on an "as if manufactured" calculation similar to the Class II calculation.

7. Both Board Staff and Dealers presented evidence of container costs. Board Staff presented container cost evidence using April 2002 costs. Dealers presented container cost evidence using August 2002 costs. (Staff Rebuttal Exhibit 2, Rebuttal Exhibit D2) Mr. DeSantis testified that Board Staff used the most current invoices at the time of their audit, but did not have the resources to gather information up until the day of the hearing. Mr. Herbein testified that the Dealers gathered their data from actual invoices as of July/August 2002. Mr. Herbein also testified that the data and documentation were shared with Board Staff within a week or two of the initial exhibit submission date. Mr. Herbein testified that the data used by Board Staff missed part of the uptick in the cost of plastic containers. We note that when confronted with two

differing sets of undisputed testimony, we must choose one or the other, based on being more or less persuaded by one set of testimony or the other. We can look at the exhibits and the testimony and see that container costs do seem to fluctuate throughout the year; some showed increases from the existing order, some showed decreases. Given this set of circumstances, the Board is persuaded that Staff's container costs are appropriate and we find that the container costs presented by Board Staff shall replace the container costs in the current order. Wherever Staff Rebuttal Exhibit 2 indicates "combined" container costs, such combined costs shall be used, rather than the individual paper or plastic costs.

8. Board Staff and Dealers presented similar evidence regarding the cost update for labor, insurance, and utility costs of \$0.0041 per point between the second quarters of 2001 and 2002. (Staff Exhibit 7, Exhibit D5) Dealers also presented evidence of additional insurance cost increases of \$0.0005 per quart which the cross section dealers would experience after the end of the second quarter of 2002. Mr. Herbein testified that the additional insurance cost increase was derived by examining premium notices and policies. The Board finds that a cost update adjustment of \$0.0046 shall replace the cost update adjustment contained in the present order. We base this finding on the concurring updates arrived at by Staff and Dealers and with the addition of \$0.0005 per quart as per Mr. Herbein's testimony. The Board finds Mr. Herbein's testimony that this additional \$0.0005 per quart will be incurred by the dealers to be persuasive and thus we adopt his recommendation.

9. Board Staff and Dealers presented similar evidence regarding Class II product costs as of April 2002. (Staff Exhibit 5, Exhibit D6) Board staff also presented evidence relative to a fixed cream add-on that is derived by comparing the cost to purchase the Class II product with the cost to manufacture that same product. (Staff Rebuttal Exhibit 6) This fixed add-on allows for an accounting of the cost required of the dealers to purchase the Class II product versus manufacturing it. The Board finds that the Class II product costs presented by the Board Staff shall replace the existing costs in the current order. The Board further finds that the fixed cream add-ons presented by Board Staff are appropriate and shall replace the fixed cream add-ons in the current order.

10. Board Staff presented evidence as to an adjustment to shrinkage, sales of bulk milk and cream, and cream processing costs. (Staff Exhibit 3) The Dealers realized a revenue of \$0.0009 per pound. The Board finds it is appropriate to include this revenue of \$0.0009 per pound in this order.

11. The current rate of return to Dealers is set at 3.5%. There was no evidence presented that the rate of return should be decreased. The Board finds that the rate of return to the Area 2 dealers shall remain at 3.5%.

D. Retailers Costs and Rate of Return

12. John Liptock testified for the Pennsylvania Food Merchants Association (PFMA) as an expert in retail store and milk accounting. Mr. Liptock testified that the indexing system being used to adjust in-store handling costs in Area 2 has worked well and should continue. The Board agrees with Mr. Liptock that the indexing system has worked well and we find that it shall continue to be used in Area 2.

13. Mr. Liptock also opined that the rate of return to retailers should at a minimum remain at 2.7%. The Board finds that the rate of return to retailers shall remain at 2.7%.

II. CONCLUSIONS OF LAW

1. The October 2, 2002, cost replacement hearing for Milk Marketing Area No. 2 was held pursuant to authority granted to the Board in section 801 of the Milk Marketing Law (Law), 31 P.S. § 700j-801.

2. The hearing was held following adequate notice, and all interested parties were given a reasonable opportunity to be heard. (Finding of Fact 2)

3. The cross-section used to establish dealer costs met the requirement of representativeness of section 801 of the Law.

4. In establishing the attached order, the Board has considered the entire record and has concluded that the adoption of this order is supported by a preponderance of the evidence and is reasonable and appropriate under section 801 of the Law, subject to any revisions or amendments the Board may make in the manner set forth in the Law.

PENNSYLVANIA MILK MARKETING BOARD

Beverly R. Minor, Chairwoman

Barbara A. Grumbine, Consumer Member

Luke F. Brubaker, Member

Date: November 6, 2002

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