



Commonwealth of Pennsylvania

Milk Marketing Board
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Official General
Order No. A-945

Posted: September 18, 2007
Effective: October 1, 2007

**AN ORDER REGARDING LICENSEE-TO-LICENSEE DISCOUNTS
ON SCHOOL MILK SALES**

NOW, this 18th day of September 2007, the Commonwealth of Pennsylvania, Milk Marketing Board (Board), adopts and 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 October 1, 2007.

SECTION I

The attached findings of fact and conclusions of law are incorporated herein by this reference as though fully set forth in this order.

SECTION II

No change shall be made to licensee-to-licensee discounts on school milk sales.

PENNSYLVANIA MILK MARKETING BOARD

Boyd E. Wolff, Chairman

Luke F. Brubaker, Member

Barbara A. Grumbine, Consumer Member

Date: September 18, 2007

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LICENSEE-TO-LICENSEE DISCOUNTS ON SCHOOL MILK SALES

August 1, 2007

FINDINGS OF FACT

1. On August 1, 2007, the Pennsylvania Milk Marketing Board (Board) convened a hearing for all milk marketing areas to receive testimony and evidence regarding licensee-to-licensee discounts on school milk sales.
2. Notice of the hearing was published at 37 *Pennsylvania Bulletin* 2915 on June 23, 2007, and was mailed to those who have requested notice of Board hearings by means of Bulletin No. 1410 dated June 13, 2007.
3. At the conclusion of the hearing, a briefing schedule was established, with briefs due August 27, 2007, reply briefs due September 10, 2007, and surreply briefs due September 17, 2007.
4. Nancy Kohl testified on behalf of The Nutrition Group (“Nutrition”). Ms. Kohl is a general manager for Nutrition, with a primary geographic area of responsibility corresponding to Pennsylvania Milk Marketing Area 3. Ms. Kohl testified that Nutrition services over 100 school districts in Pennsylvania to manage their food service programs. Ms. Kohl testified that Nutrition is able to operate school food service programs more efficiently and effectively than the schools themselves by controlling all aspects of costs and spending while also increasing revenue through increased participation in the national school breakfast and lunch programs. Ms. Kohl attributed Nutrition’s ability to achieve those goals through Nutrition’s purchasing power, specialized marketing and merchandising techniques, and corporate support structure.
5. Ms. Kohl testified that Nutrition’s milk subdealer license allows Nutrition to control delivery, stock rotation, variety, and volume of milk very closely. She also testified that as a subdealer, Nutrition has a vested interest in milk consumption by students; to that end, Nutrition develops and maintains promotion and marketing materials (not all related to milk).
6. Ms. Kohl testified that the milk subdealer discounts available to Nutrition defray the cost of handling milk products and paying and processing invoices, developing marketing and promotional material, supplying necessary coolers to maintain quality products, and transportation costs. In Milk Marketing Area 5, subdealer discounts are available on a one delivery per school district per day basis, where in all other areas subdealer discounts are available on a one delivery per area per day basis. Ms. Kohl testified that in milk marketing areas other than Area 5, Nutrition must find alternate ways to defray the costs noted above. According to Ms. Kohl, one option available to Nutrition would be to develop its own transportation and delivery system.

7. Ms. Kohl requested that the Board adopt licensee-to-licensee discounts for subdealers serving schools similar to the structure currently in place in Area 5. That is, discounts would be available in all other areas on a one delivery per school district per day basis, rather than the current one delivery per area per day basis. Although Ms. Kohl's proposal was for each area to keep its volume and percentage requirements, with the only change being to allow one delivery per school district rather than one delivery per area, she also testified that she would be satisfied if the 15% discount in Area 5 were applied statewide for sales to subdealers servicing schools. Ms. Kohl believed that changing the discount structure would be beneficial: children and customers would not see any change in service, processors would retain their current volume of business and more processors may be utilized to service Nutrition's territories, and Nutrition would have the discounts available to defray its costs and would not have to address the added responsibility of its own transportation. Ms. Kohl testified that if Nutrition "loses" the milk discounts, it may be necessary to increase its fee structure to help defray its costs. Ms. Kohl also believed that Nutrition earns the discounts because it is responsible for handling problems that arise with milk and milk deliveries and because it absorbs the costs of inventory over runs.
8. Dan Bazylak testified for Nutrition. Mr. Bazylak is the regional vice president for Nutrition in northwestern Pennsylvania, which corresponds roughly to Pennsylvania Milk Marketing Area 5. Mr. Bazylak testified that in Area 5, Nutrition takes one delivery per school district per day from processors and then stores and redistributes the product and performed the same services Ms. Kohl described. Mr. Bazylak testified that the Area 5 discount arrangement allowed Nutrition to operate overall at a better cost structure than in Area 6. Mr. Bazylak also requested that the Area 5 one delivery per school district per day discount be adopted in all other milk marketing areas. Mr. Bazylak believed that the Area 5 arrangement had worked well with Nutrition's dairy suppliers.
9. Edward W. Schneider, Jr., Vice President of Sales and Marketing for Schneider's Dairy, Inc. ("Schneider"), testified in support of Nutrition's proposal. Mr. Schneider testified that Schneider was "happy" to serve Nutrition in Area 5 under the current discount arrangement and further testified that the arrangement had worked well in Schneider's experience. Mr. Schneider testified that treating school district deliveries in other milk marketing areas differently was not justified, noting that Schneider's experience is that servicing a licensee for school milk sales involves very similar requirements from area to area. Mr. Schneider testified that the cost of delivery and handling for these accounts is basically the same and therefore Nutrition should be allowed to receive the discount on a per school district basis in all milk marketing areas. Mr. Schneider recommended that the 15% discount applicable in Area 5 be adopted statewide, rather than using the discounts currently in place in each milk marketing area.
10. Carl D. Herbein, CPA, testified on behalf of the Pennsylvania Association of Milk Dealers. Mr. Herbein testified that the licensee-to-licensee discounts have historically been developed to allow what he termed a "traditional" subdealer to purchase dairy products from a processor and then distribute those products to a wide variety of wholesale and retail customers. Mr. Herbein testified that the economics provided to the

subdealer by the discount were intended to provide a margin to the subdealer sufficient to cover its operating costs, including the cost of subsequent distribution, and provide a reasonable return. In Mr. Herbein's view, Nutrition services its school business in a different fashion than a "traditional" subdealer by providing a food service function, rather than merely the distribution and sale of dairy and related products. Mr. Herbein also testified that he reviewed "selected" school deliveries in each of the milk marketing areas that would be affected by Nutrition's proposal and concluded that the volume would not be sufficient to justify the discount levels that would apply if the existing licensee-to-licensee discounts in Areas 1, 2, 3, 4, and 6 were permitted for school milk sales to subdealers on a one delivery per school district per day basis.

11. The Board finds that no change should be made to licensee-to-licensee discounts on school milk sales in any Pennsylvania Milk Marketing Area. Section 801 of the Milk Marketing Law (31 P.S. section 700j-801) requires the Board to set minimum wholesale prices at a level that will provide for a reasonable return on aggregate milk sales by a representative cross-section of milk dealers. The currently applicable discounts in all milk marketing areas were established with that mandate in mind. We believe that we should not change the currently applicable discounts without evidence regarding the costs associated with making the number and type of deliveries contemplated by Nutrition's proposal. Without such evidence, the Board has no way to evaluate the effects of changing the discounts. Mr. Schneider did testify that in Schneider's experience, servicing a licensee for school milk sales involves very similar requirements from area to area. However, one processor is not a representative cross-section of milk dealers. No other evidence was presented quantifying the costs associated with making the deliveries in question. Since no cost-based evidence was presented that would allow the Board to evaluate the effects of the proposal, we find that we cannot adopt it.

CONCLUSIONS OF LAW

1. The August 1, 2007, hearing regarding licensee-to-licensee discounts on school milk sales was held pursuant to the authority granted to the Board in sections 801 and 803 of the Milk Marketing Law (Law) (31 P.S. §§ 700j-801 and 700j-803).
2. The hearing was held following adequate notice and all interested parties were given a reasonable opportunity to be heard.
3. In adopting the attached order, the Board has considered the entire record and concludes that the order is supported by the credible evidence presented and is reasonable and appropriate under sections 801 and 803 of the Law.
4. The attached order may be amended pursuant to the procedures set out in section 801 of the Law.

PENNSYLVANIA MILK MARKETING BOARD

Boyd E. Wolff, Chairman

Luke F. Brubaker, Member

Barbara A. Grumbine, Consumer Member

Dated: September 18, 2007

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