UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	2006 AMA Docket No. M-4-1
	)	
Lanco Dairy Farms Cooperative,	)	
	)	
Petitioner	)	**Decision and Order**

PROCEDURAL HISTORY

Lanco Dairy Farms Cooperative [hereinafter Lanco] instituted this proceeding by filing a "Petition Contesting Interpretation and Application of Certain Federal Milk Order Regulations and for Restitution of Obligations and Costs Incurred" [hereinafter Petition] on November 17, 2005. Lanco instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the Agricultural Marketing Agreement Act]; the federal order regulating the handling of milk in the Northeast marketing area[1] (7 C.F.R. pt. 1001) [hereinafter the Northeast Milk

[1]The term *Northeast marketing area* refers to a geographic area that includes the states of Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont, and the District of Columbia, as well as all of Maryland except Allegany and Garrett counties, all of New York except those counties and townships specifically excepted, and specified counties in Pennsylvania and Virginia (7 C.F.R. § 1001.2).

Marketing Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71).

Lanco seeks: (1) a declaration that the Market Administrator's[2] construction of the term "reporting unit" in 7 C.F.R. § 1001.13(b)(2) is not in accordance with law; (2) a declaration that the meaning of the term "reporting unit" in 7 C.F.R. § 1001.13(b)(2) is the same as the meaning of the term "state units" in 7 C.F.R. § 1001.13(b)(1); (3) a refund of all costs and expenses incurred by Lanco because of the Market Administrator's construction of the term "reporting unit" in 7 C.F.R. § 1001.13(b)(2); and (4) an award of all attorney fees, costs, and expenses incurred by Lanco in connection with the instant proceeding (Pet. ¶ 24).

On December 16, 2005, Lloyd Day, Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed "Answer of Defendant": (1) denying the material allegations of the Petition; (2) asserting Lanco failed to state a claim upon which relief can be granted; and (3) asserting the Market Administrator's interpretation of the Northeast Milk Marketing Order is in accordance with law and binding upon Lanco.

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[2]The term *market administrator* refers to the United States Department of Agriculture employee responsible for the administration of a federal milk marketing order. The Secretary of Agriculture selects a market administrator for each federal milk marketing order and the market administrator is subject to removal at the Secretary of Agriculture's discretion (7 C.F.R. § 1000.25(a)). The powers and duties of market administrators are specified in 7 C.F.R. § 1000.25(b)-(c). At all times material to this proceeding, Erik Rasmussen was the Market Administrator for the Northeast Milk Marketing Order.

On September 26, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] conducted a hearing in Washington, DC. John H. Vetne, Raymond, New Hampshire, represented Lanco. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. On January 11, 2007, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision]: (1) concluding the Market Administrator's interpretation of the Northeast Milk Marketing Order is in accordance with the law; and (2) dismissing Lanco's Petition (Initial Decision at 8).

On February 9, 2007, Lanco filed an appeal petition and a request for oral argument before the Judicial Officer. On March 15, 2007, the Administrator filed a response opposing Lanco's appeal petition and Lanco's request for oral argument. On March 19, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's dismissal of Lanco's Petition. Lanco's exhibits are designated by "PX." Transcript references are designated by "Tr."

DECISION

Discussion

The Issue

The issue to be resolved in this proceeding is whether the Market Administrator's determination that Lanco is a "reporting unit," as that term is used in 7 C.F.R. §

1001.13(b)(2), is in accordance with law. The Administrator contends Lanco is a "reporting unit," as that term is used in 7 C.F.R. § 1001.13(b)(2); consequently, for pooling purposes, Lanco must satisfy the shipping standards for a supply plant pursuant to 7 C.F.R. § 1001.7(c). Lanco contends it is not a "reporting unit." Lanco asserts the term "reporting unit" has the same meaning as the term "state units" in 7 C.F.R. § 1001.13(b)(1); consequently, the shipping standards for a supply plant in 7 C.F.R. § 1001.7(c) are applicable only to reporting units of 7 C.F.R. § 1000.9(c) handlers which are located outside the states included in the Northeast marketing area and outside Maine and West Virginia.

Burden of Proof

The burden of proof in a proceeding instituted under 7 U.S.C. § 608c(15)(A) rests with the petitioner, and, in order to prevail in this proceeding, Lanco has the burden of proving that the Market Administrator's determination that Lanco is a "reporting unit," as that term is used in 7 C.F.R. § 1001.13(b)(2), is not in accordance with law.[3] I find Lanco has not met its burden.

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[3] *United States v. Rock Royal Co-op., Inc.,* 307 U.S. 533 (1939); *Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *In re Stew Leonard's*, 59 Agric. Dec. 53, 69 (2000), *aff'd*, 199 F.R.D. 48 (D. Conn. 2001), *printed in* 60 Agric. Dec. 1 (2001), *aff'd*, 32 F. App'x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002); *In re Garelick Farms, Inc.,* 56 Agric. Dec. 37, 39 (1997); *In re Mil-Key Farm, Inc.,* 54 Agric. Dec. 26, 54 (1995).

Facts

Lanco is a "cooperative association"[4] of dairy farmers incorporated in Pennsylvania with its principal place of business in Hagerstown, Maryland. Lanco was formed in 1998 with approximately 30 members. As of the date of the September 26, 2006, hearing, Lanco had approximately 825 members. (Tr. 12-15; Pet. ¶ 1.) Lanco has been a "handler"[5] since prior to January 1, 2000. Lanco's primary customers for its members' Class I milk[6] historically have been four bottling pool plants,[7] each of which has its own independent suppliers. These four bottling pool plants are: (1) Cloverland-Greenspring, located in Baltimore, Maryland; (2) High Point Dairy, located in Delaware; (3) Harrisburg Dairies, located in Harrisburg, Pennsylvania; and (4) Reddington Farms, located in New Jersey. Their purchases of Lanco's Class I milk are seasonal, in effect making Lanco a supplemental and balancing supplier for those four plants. Lanco also

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[4]The term *cooperative association* means any cooperative marketing association of producers which the Secretary of Agriculture determines: (1) is qualified under the provisions of the Capper-Volstead Act (7 U.S.C. §§ 291-292), (2) has full authority with regard to the sale of milk of its members, and (3) is engaged in the marketing of milk or milk products for its members (7 C.F.R. § 1000.18).

[5]The word *handler* includes any cooperative association with respect to milk that it receives for its account from the farm of a producer and delivers to pool plants or diverts to nonpool plants pursuant to 7 C.F.R. § 1001.13 (7 C.F.R. § 1000.9(c)).

[6]Milk is classified in accordance with its utilization. There are four classifications of milk—Class I milk, Class II milk, Class III milk, and Class IV milk (7 C.F.R. § 1000.40(a)-(d)). Class I milk generally refers to milk used for fluid milk products (7 C.F.R. § 1000.40(a)).

[7]The term *pool plant* is defined in 7 C.F.R. § 1001.7.

sells milk, which is not Class I milk, to Saputo Cheese. Lanco delivers all of its additional milk, with the exception of deliveries to some small customers, to a pool plant in Laurel, Maryland. (Tr. 16-18.)

Pooling entitles Lanco's members to receive the same blend price as other producers supplying milk to the market, but, in order for Lanco's members to receive the blend price, the milk sold by Lanco must qualify for the market-wide revenue pool as "producer milk"[8] under the Northeast Milk Marketing Order. Qualification for the blend price requires that specified percentages of milk, which vary by season, be included in the pool and limits the amount of milk that can be diverted to nonpool plants. Until June 2005, Lanco qualified for the blend price under the Northeast Milk Marketing Order (Tr. 19-20).

The Northeast Milk Marketing Order provides that the milk received by a handler must satisfy the shipping standards specified for a supply plant, as follows:

> **§ 1001.13 Producer milk.**
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> *Producer milk* means the skim milk (or skim equivalent of components of skim milk) and butterfat contained in milk of a producer that is:
>
> . . . .
>
> (b) Received by the operator of a pool plant or a handler described in § 1000.9(c) in excess of the quantity delivered to pool plants subject to the following conditions:
>
> (1) The producers whose farms are outside of the states included in the marketing area and outside the states of Maine or West Virginia shall be

[8]The term *producer milk* is defined in 7 C.F.R. § 1001.13.

> organized into state units and each such unit shall be reported separately; and
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> (2) *For pooling purposes, each reporting unit must satisfy the shipping standards specified for a supply plant pursuant to § 1001.7(c)*[.]

7 C.F.R. § 1001.13(b) (emphasis added). Effective June 1, 2005, the Northeast Milk Marketing Order was amended by increasing supply plant shipment requirements in 7 C.F.R. § 1001.7(c) and reducing the volume of producer milk eligible for diversion in 7 C.F.R. § 1001.13(d).[9] The Northeast Milk Marketing Order contains the shipping standards for supply plants, as follows:

> **§ 1001.7 Pool plants.**
>
> *Pool plant* means . . . .
>
> . . . .
>
> (c) A supply plant from which fluid milk products are transferred or diverted to plants described in paragraph (a) or (b) of this section subject to the additional conditions described in this paragraph. In the case of a supply plant operated by a cooperative association handler described in § 1000.9(c), fluid milk products that the cooperative delivers to pool plants directly from producers' farms shall be treated as if transferred from the cooperative association's plant for the purpose of meeting the shipping requirements of this paragraph.
>
> (1) In each of the months of January through August and December, such shipments and transfers to distributing plants must not equal less than

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[9]The amendments increasing supply plant shipment requirements in 7 C.F.R. § 1001.7(c) and reducing the volume of producer milk eligible for diversion in 7 C.F.R. § 1001.13(d) were the result of a multi-day, rulemaking hearing which considered a number of amendments regarding the quantity of milk that must be shipped and transferred to a distributing plant in order for the milk to be included in the pool. A rulemaking document containing these proposed amendments to the Northeast Milk Marketing Order was published in the Federal Register on January 31, 2005 (70 Fed. Reg. 4932-55 (Jan. 31, 2005)), and became effective after the proposed amendments received a favorable vote by at least two-thirds of the producers engaged in the production of milk for sale in the Northeast marketing area (70 Fed. Reg. 18,961-63 (Apr. 12, 2005)).

> 10 percent of the total quantity of milk (except the milk of a producer described in §1001.12(b)) that is received at the plant or diverted from it pursuant to § 1001.13 during the month; [and]
>
> (2) In each of the months of September through November, such shipments and transfers to distributing plants must equal not less than 20 percent of the total quantity of milk (except the milk of a producer described in § 1001.12(b)) that is received at the plant or diverted from it pursuant to § 1001.13 during the month[.]

7 C.F.R. § 1001.7(c)(1)-(2).

In early July 2005, the Market Administrator notified Lanco that it had failed to meet the pooling requirements because its deliveries to the Laurel, Maryland, pool plant during the month of June were not qualifying deliveries for meeting pool eligibility requirements. (While the Laurel, Maryland, plant is a pool supply plant, it is not a pool distributing plant). The Market Administrator advised Lanco that these eligibility requirements would not be enforced for June 2005, but they would be enforced beginning in July 2005. (Tr. 19-23.)

On July 13, 2005, Lanco sent the Market Administrator a memorandum requesting reconsideration of the determination that Lanco did not meet pool eligibility requirements in June 2005 and explaining the hardship that fulfilling the requirements of 7 C.F.R. § 1001.7(c) would cause Lanco (Pet. Attach. A; PX 1). By letter dated July 15, 2005, the Market Administrator reaffirmed his position and rejected Lanco's request for reconsideration (Pet. Attach. B; PX 2). Lanco then sought review by the Dairy Programs Administrator, Agricultural Marketing Service, requesting that he overrule the Market Administrator. In an undated letter, John R. Mengel, the Acting Deputy Administrator,

Dairy Programs, affirmed the Market Administrator's position (Pet. Attach. C; PX 3). In July 2005, Lanco also met with, and unsuccessfully pleaded its case to, Dairy Programs personnel, including Dana Coale, John R. Mengel, Gino Tosi, and an individual believed to be Dave Jamison (Tr. 25).

In order to continue to qualify for revenue sharing, Lanco initially made arrangements to meet the pooling requirements by purchasing milk from the independent suppliers to the four bottling plants, delivering Lanco milk to the bottling plants, and delivering the same amount of the purchased independent suppliers' milk to Saputo Cheese (Tr. 21-22). Thereafter, Lanco entered into a contract with Maryland-Virginia Milk Producers, another cooperative association, under which Lanco pays a pooling accommodation fee for the right to divert Lanco's milk to one of Maryland-Virginia Milk Producers' Class I milk customers thereby enabling Lanco to meet the pool qualification requirements (Tr. 32-33). Thus, Lanco's cost of qualification includes the accommodation fee and the increased cost of transportation. Lanco maintains, in order to comply with 7 C.F.R. § 1001.7(c), it has paid pooling accommodation fees and additional transportation costs of $26,000 to $30,000 per month (Tr. 34-38).

Although the locations of all of Lanco's producer-members were not identified, Lanco indicates it has not received any producer milk from dairy farms outside the Northeast marketing area, Maine, and West Virginia (Tr. 15, 55-56).

Meaning of the Northeast Milk Marketing Order

As in any case of statutory or regulatory construction, the analysis begins with the language of the statute or regulation and, where the statutory or regulatory language provides a clear answer, it ends there as well.[10] The Northeast Milk Marketing Order defines the term "producer milk" as the skim milk (or the skim milk equivalent of components of skim milk) and butterfat contained in milk of a producer that is received by a handler described in 7 C.F.R. § 1000.9(c) in excess of the quantity delivered to pool plants subject to the following conditions—for pooling purposes, each reporting unit must satisfy the shipping standards specified for a supply plant pursuant to 7 C.F.R. § 1001.7(c) (7 C.F.R. § 1001.13(b)(2)). Section 1001.13(b)(2) of the Northeast Milk Marketing Order (7 C.F.R. § 1001.13(b)(2)) makes no reference to 7 C.F.R. § 1001.13(b)(1), the term "reporting unit" is not used in 7 C.F.R. § 1001.13(b)(1), and I find no basis on which to conclude that the term "reporting unit" in 7 C.F.R. § 1001.13(b)(2) has the same meaning as the term "state units" in 7 C.F.R. § 1001.13(b)(1).

I conclude the meaning of the words of 7 C.F.R. § 1001.13(b)(2) requires, for pooling purposes, handlers described in 7 C.F.R. § 1000.9(c), such as Lanco, to satisfy the shipping standards specified for supply plants pursuant to 7 C.F.R. § 1001.7(c).

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[10] *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *Freytag v. Comm'r*, 501 U.S. 868, 873 (1991).

The Market Administrator's Determination is Accorded Deference

An administrative agency's interpretation of its own regulations will be accorded deference in any administrative proceeding, and an agency's construction of its own regulations has controlling weight, unless it is plainly erroneous or inconsistent with the regulations.[11]

The Market Administrator is responsible for administering the Northeast Milk Marketing Order and making regulations to effectuate the terms of the Northeast Milk Marketing Order (7 C.F.R. § 1000.25(b)(1), (3)). The Market Administrator has been working with milk marketing orders for 33 years. During the period 1990 through 1999, Mr. Rasmussen was the market administrator for the New England marketing area. On January 1, 2000, the New England marketing area was merged with the New York-New Jersey marketing area and the Middle Atlantic marketing area to form the Northeast marketing area. Mr. Rasmussen has been the Market Administrator for the Northeast Milk Marketing Order since its inception on January 1, 2000 (Tr. 85-87). The Market Administrator was involved in writing 7 C.F.R. § 1001.13(b) and has consistently interpreted the term "reporting unit" in 7 C.F.R. § 1001.13(b)(2) to include handlers, such as Lanco, located in the Northeast marketing area (Tr. 90, 93-94).

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[11] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

It is well settled that an official who is responsible for administering a regulatory program has authority to interpret the provisions of the statute and regulations. Moreover, the interpretation of that official is entitled to great weight.[12]

The doctrine of affording considerable weight to interpretation by the administrator of a regulatory program is particularly applicable in the field of milk. As stated by the court in *Queensboro Farms Products, Inc. v. Wickard*, 137 F.2d 969, 980 (2d Cir. 1943) (footnotes omitted):

> The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts. If ever there was a place for that doctrine, it is, as to milk, in connection with the administration of this Act because of its background and legislative history. The Supreme Court has, at least inferentially, so recognized.

Similarly, in *Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966), the court stated:

> A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority.

I give considerable weight to the Market Administrator's determination that Lanco is a "reporting unit," as that term is used in 7 C.F.R. § 1001.13(b)(2), and required, for

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[12] *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 650 (6th Cir. 1966); *In re Stew Leonard's*, 59 Agric. Dec. 53, 73 (2000), *aff'd*, 199 F.R.D. 48 (D. Conn. 2001), *printed in* 60 Agric. Dec. 1 (2001), *aff'd*, 32 F. App'x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 76-77 (1995); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 19 (1990).

pooling purposes, to satisfy the shipping standards specified for a supply plant, pursuant to 7 C.F.R. § 1001.7(c). I do not find the Market Administrator's construction of 7 C.F.R. § 1001.13(b) either plainly erroneous or inconsistent with the Northeast Milk Marketing Order. Therefore, I defer to the Market Administrator's determination.

Effect of Lanco's Interpretation of 7 C.F.R. § 1001.13(b)

Lanco seeks a declaration that the term "reporting unit" in 7 C.F.R. § 1001.13(b)(2) has the same meaning as the term "state units" in 7 C.F.R. § 1001.13(b)(1) (Pet. ¶ 24). The declaration sought by Lanco would create an economic trade barrier against milk that originates outside the Northeast marketing area. Under Lanco's interpretation, only reporting units of 7 C.F.R. § 1000.9(c) handlers, which are located outside of the states included in the Northeast marketing area and outside Maine and West Virginia, would be required, for pooling purposes, to satisfy the shipping standards specified for a supply plant, pursuant to 7 C.F.R. § 1001.7(c). Handlers, as defined in 7 C.F.R. § 1000.9(c), located in the states included in the Northeast marketing area and in Maine and West Virginia, would not be required, for pooling purposes, to satisfy the shipping standards for a supply plant, pursuant to 7 C.F.R. § 1001.7(c) (Tr. 95). This disparity of treatment between handlers in the states included in the Northeast marketing area and in Maine and West Virginia, and handlers outside the states included in the Northeast marketing area and outside Maine and West Virginia, would create an economic trade barrier against milk that originates outside the Northeast marketing area.

The Agricultural Marketing Agreement Act provides that no milk marketing order shall prohibit or limit marketing, in the area covered by that order, of milk produced in the United States but outside the milk marketing area, as follows:

> **§ 608c. Orders regulating handling of commodity**
>
> . . . .
>
> **(5) Milk and its products; terms and conditions of orders**
>
> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> . . . .
>
> (G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

7 U.S.C. § 608c(5)(G). The Supreme Court of the United States held, in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76 (1962), 7 U.S.C. § 608c(5)(G) prohibits the Secretary of Agriculture from establishing economic trade barriers.[13] Adoption of Lanco's interpretation of 7 C.F.R. § 1001.13(b) would create a trade barrier

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[13] *See also Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 379 (1964) (stating 7 U.S.C. § 608c(5)(G) is intended to prevent the Secretary of Agriculture from setting up trade barriers to the importation of milk from other production areas in the United States); *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 20 (D.C. Cir. 1979) (stating 7 U.S.C. § 608c(5)(G) is addressed primarily to obstacles to the marketing in one area of milk and milk products produced in another area); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315 (3d Cir. 1968) (stating 7 U.S.C. § 608c(5)(G) is designed to ensure that no regulation would be promulgated placing a greater burden on outside milk and milk products entering the market than is placed on milk and milk products within the market; the Secretary of Agriculture may require no more than equal treatment of pool and nonpool milk), *cert. denied*, 394 U.S. 929 (1969).

against milk that originates outside the Northeast marketing area; viz., if the Secretary of Agriculture were to adopt Lanco's interpretation of 7 C.F.R. § 1001.13(b), the Secretary of Agriculture would place a greater burden on outside milk entering the Northeast marketing area than is placed on milk produced in the Northeast marketing area. The Agricultural Marketing Agreement Act (7 U.S.C. § 608c(5)(G)) precludes adoption of Lanco's interpretation of 7 C.F.R. § 1001.13(b).

Lanco's Appeal Petition

Lanco raises two issues in Lanco's Petition of Appeal to the Secretary and Request for Oral Argument on Issues [hereinafter Appeal Petition]. First, Lanco contends the ALJ erred because he did not address the "regulatory history facts," "acknowledge the only rulemaking decision explaining the intent" of 7 C.F.R. § 1001.13(b)(2), or discuss the judicial cannons of regulatory interpretation (Appeal Pet. at 2).

The ALJ did not address the "regulatory history" of or the rulemaking documents explaining the intent of 7 C.F.R. § 1001.13(b)(2) and did not discuss the cannons of statutory construction. I do not find the ALJ's failure to address the regulatory history of or the rulemaking documents explaining the intent of 7 C.F.R. § 1001.13(b)(2) or the ALJ's failure to discuss the cannons of statutory construction, error. Based upon the ALJ's conclusions of law, 7 C.F.R. § 1001.13(b)(2) requires, for pooling purposes, handlers described in 7 C.F.R. § 1000.9(c), such as Lanco, to satisfy the shipping standards specified for supply plants pursuant to 7 C.F.R. § 1001.7(c). I have reviewed

Lanco's regulatory history and regulatory construction arguments and find them without merit.

Second, Lanco contends the ALJ mistakenly relied on a 2002 rulemaking proceeding in which neither the content of 7 C.F.R. § 1001.13(b)(2) nor the meaning of 7 C.F.R. § 1001.13(b)(2) was at issue (Appeal Pet. at 2).

The rulemaking proceeding commenced on September 10, 2002, which resulted in amendments to the Northeast Milk Marketing Order, effective June 1, 2005, did not amend 7 C.F.R. § 1001.13(b)(2); however, the ALJ does not indicate that the rulemaking proceeding commencing September 10, 2002, resulted in an amendment to 7 C.F.R. § 1001.13(b)(2), as Lanco contends. Instead, as the ALJ correctly indicates, the rulemaking proceeding commenced September 10, 2002, resulted in amendments to the Northeast Milk Marketing Order which increased supply plant shipment requirements in 7 C.F.R. § 1001.7(c) and reduced the volume of producer milk eligible for diversion in 7 C.F.R. § 1001.13(d). Therefore, I find the ALJ's reference to the rulemaking proceeding commenced September 10, 2002, was not error.

Lanco's Request for Oral Argument

Lanco's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[14] is refused because the parties have thoroughly

[14] 7 C.F.R. § 900.65(b)(1).

briefed the issues and the issues are not complex. Thus, oral argument would serve no useful purpose.

Findings of Fact

1. Lanco is a cooperative association of dairy farmers incorporated in Pennsylvania with its principal place of business in Hagerstown, Maryland.

2. Lanco was formed in 1998 with approximately 30 members. On September 26, 2006, Lanco had approximately 825 members located in Pennsylvania, Maryland, and West Virginia.

3. Lanco markets the raw milk of its members to milk plants in the Northeast marketing area.

4. Lanco has been a handler since prior to January 1, 2000.

5. In order for Lanco's members to receive the same blend price as other producers supplying milk to the market, the milk sold by Lanco must qualify for the market-wide revenue pool as "producer milk" under the Northeast Milk Marketing Order (7 C.F.R. § 1001.13).

6. The Northeast Milk Marketing Order (7 C.F.R. § 1001.13(b)) provides that the milk received by a handler must satisfy the shipping standards specified for a supply plant pursuant to 7 C.F.R. § 1001.7(c).

7. Prior to June 2005, the milk sold by Lanco qualified for revenue sharing purposes as "producer milk," and Lanco's members received the same blend price as other producers supplying milk to the market.

8. The Northeast Milk Marketing Order was amended, effective June 1, 2005.[15] The amendments increased supply plant shipment requirements in 7 C.F.R. § 1001.7(c) and reduced the volume of producer milk eligible for diversion in 7 C.F.R. § 1001.13(d).

9. In July 2005, the Market Administrator informed Lanco that it had failed to qualify for revenue sharing purposes in June 2005 because it had failed to meet the shipping standards for pooling by shipping the required percentage of milk to a pool distributing plant, as was required by the amendment of the Northeast Milk Marketing Order.[16] The Market Administrator waived the requirement for June 2005, but not for subsequent months.

10. In order to meet the post-amendment shipping standards, Lanco has incurred additional monthly expenses of $26,000 to $30,000 in transportation costs and pooling accommodation fees, from July 2005 through the date of the September 26, 2006, hearing.

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[15]70 Fed. Reg. 18,961-63 (Apr. 12, 2005).

[16]Prior to June 2005, Lanco had qualified for revenue sharing by delivering the required percentages of milk to the Laurel, Maryland, pool supply plant. After June 1, 2005, only deliveries of milk to pool distributing plants qualified to meet the performance standards.

Conclusions of Law

1. Lanco has the burden of proof in any proceeding instituted pursuant to 7 U.S.C. § 608c(15)(A). Lanco has failed to meet the burden of proof in this proceeding.

2. Lanco is a "cooperative association" described in 7 C.F.R. § 1000.18.

3. Lanco is a "handler" described in 7 C.F.R. § 1000.9(c) and a "reporting unit," as that term is used in 7 C.F.R. § 1001.13(b)(2).

4. Lanco is required, for pooling purposes, to satisfy the shipping standards specified for a supply plant pursuant to 7 C.F.R. § 1001.7(c).

5. The Market Administrator's determination that Lanco is a "reporting unit," as that term is used in 7 C.F.R. § 1001.13(b)(2), is consistent with the language of the Northeast Milk Marketing Order and is in accordance with law.

6. The Market Administrator's determination that Lanco, for pooling purposes, must satisfy the shipping standards for a supply plant pursuant to 7 C.F.R. § 1001.7(c) is consistent with the language of the Northeast Milk Marketing Order and is in accordance with law.

7. The Secretary of Agriculture is precluded by 7 U.S.C. § 608c(5)(G) from granting the declaratory relief requested by Lanco.

For the foregoing reasons, the following Order is issued.

ORDER

1. Lanco's Petition is denied.

2. This Order shall become effective on the day after service of this Order on Lanco.

RIGHT TO JUDICIAL REVIEW

Lanco has the right to obtain review of the Order in this Decision and Order in any district court of the United States in which Lanco has its principal places of business. Lanco must file a bill in equity for the purpose of review of the Order in this Decision and Order within 20 days from the date of entry of the Order in this Decision and Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture.[17] The date of entry of the Order in this Decision and Order is September 26, 2007.

Done at Washington, DC

September 26, 2007

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William G. Jenson
Judicial Officer

[17] 7 U.S.C. § 608c(15)(B).