

MILK CONTROL BOARD, STATE: Repayment of excessive payments voluntarily made by distributors, whether same can be made, and, if so, out of what fund paid.

March 22, 1937.

Hon. C. M. Humrickhouse,
Executive Secretary,
Indiana Milk Control Board,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an official opinion based upon an assumed statement of facts substantially as follows:

The Indiana Milk Control Board pursuant to sub-section 5 of section 5 of the Milk Control Act of 1935 has designated and defined a "marketing area" known as the "Marion County Marketing Area" and pursuant to sub-section (7) of section 5 of said Act has appointed a local milk committee which has employed an administrator to assist in carrying out the purposes of the Act as applied to such "marketing area."

The Indiana Milk Control Board, pursuant to authority conferred upon it by law, enacted its Official Order No. 2 whereby, among other things, the administrator of the above "marketing area" is authorized to figure what is described in your letter as the "pool" and thereby fix a uniform price to be paid to all producers in said "marketing area." In October and November, 1935, three pools were figured in which the administrator fixed the prices for milk to be paid by the distributors which the distributors now claim were unjust to them. That is the prices actually paid to producers under the requirement, it is claimed, were too high to the extent of \$5,000.00 in the aggregate which amount the distributors now ask the administrator to repay to them.

For the purpose of your inquiry, it is sufficient to state that the administrator is authorized to collect from distributors two separate funds. One of these funds is an "equalization fund" which is collected from the distributors and is held by the administrator for their benefit and repaid to them in such proportions as will equalize the cost to the distributors upon the basis of the class of milk received by them notwithstanding the payment of a uniform price irrespective of class of milk received. In referring to "class

of milk received" the reference is not to quality but to the use to which it is to be put, that is "bottle milk" is in one class, yields the highest return and therefore should cost the most; milk used for making ice-cream is another class, yielding a lower return and milk used for making butter is in yet another class yielding a still lower return.

I pause here for a break in the statement of the assumed facts to call your attention to the fact that this "equalization fund" is a fund which clearly belongs to the distributors for the above purpose, and, as I am informed, has been so used. It, therefore, does not enter into the controversy and is mentioned incidentally only to clarify the situation as to the next fund to which I shall call attention, out of which, it has been suggested, the \$5,000.00 demanded by the distributors may be paid.

This latter fund is produced in the following manner. In figuring the uniform price to be paid to producers, the price per cwt., figured in accordance with Official Order No. 2, *supra*, and without taking into consideration sub-section V (f) of Exhibit B attached to said order, rarely comes out in even cents. It may, for example, figure \$2.3552 per cwt. This would be cumbersome in figuring the amounts due to individual producers and for that reason the administrator may order the price to be paid direct to producers to be \$2.35 per cwt. and the balance \$.0052 per cwt. to be sent to the administrator which the administrator holds in this special fund.

The collection and use of this fund seems to be authorized and provided for by sub-section V (f) of Exhibit B attached to Official Order No. 2, already referred to, which is as follows:

"The administrator may, with the approval of the local milk committee, adjust the blended price computed pursuant to V (e), for the purpose of establishing and maintaining a reserve fund against:

"(1) The failure or delay of distributors to make payments on equalization accounts pursuant to V (e) 2;

"(2) errors and discrepancies in reports of distributors; and

"(3) errors and discrepancies in equalization accounts, including adjustments on delayed reports of distributors.

"If and when all or any portion of the said reserve fund is not necessary to accomplish the purpose for which it was created, equitable distribution thereof shall be made by the administrator to the producers supplying the market for distribution in the marketing area."

The distribution to producers of this fund as authorized by the last literary paragraph of the above quoted provision is ordinarily accomplished in the following manner. It may be that the price will figure \$2.3585 per cwt. and to simplify the computations, the price is fixed at \$2.36. When that occurs the overpayment is made up to the distributors out of the fund created as above provided, which it readily will be observed, operates as if the distribution had been made to the producers and the price paid by the distributors had been permitted to be the actual figured price of \$2.3585 per cwt. instead of \$2.36 per cwt. In other words, the balances paid to the administrator in cases where there are fractional deductions from the actual figured price resulting in an underpayment to the producers is used to offset the overpayments where there are fractional additions to the actual figured price as above described. This, of course, is tantamount to a distribution to the producers.

You submit the following questions:

"1. To whom does this fund of approximately \$5,000 belong?

"2. Do the producers, estimated herein at approximately 1,300, in number, who left the market after the three payments, own a share in this fund?

"3. Do the 1,300 who have come into the market since, have an interest in this fund accumulated before they came in?

"4. Can funds coming into the administrator's hands from producer payments, as explained, after these three payments were made be subject under any conditions to the payment of the claim of distributors which accrued (if it did accrue) before the new members came into the market?

"5. What relation does the administrator bear to this fund?

"6. Has the administrator any legal right to comply with the demand for payment out of the funds he has or out of any fund?

"7. If he can't pay it legally, is there any way you can suggest it can be paid?"

It seems to me that there is another question which lies at the very threshold of the matter under consideration which probably renders answers to the above questions unnecessary and that is the question as to whether the distributors have a legal claim against anyone on account of the alleged excessive price paid to producers during October and November, 1935.

I think, in the first place, the payments which are claimed to have been excessive, upon the basis of the statements contained in your letter, were voluntary payments both as to the amounts paid to producers and as to any sums which were paid to the administrator. You state in your letter that "there was no compulsion of any kind used by anyone to induce the distributors to pay the three times in question." You state further that "the distributors made these payments with full knowledge of facts" and that "no error in the actual figuring of prices occurred." You also state that there was no fund nor duress. If the above statements are correct, there can be no liability for repayment since the rule is settled that voluntary payments with full knowledge of the facts cannot be recovered.

Cummins v. White, 4 Blackford 356 at p. 362;
Patterson v. Cox, 25 Ind. 261 at p. 267.

Apparently, also, upon the basis of your letter there was no previous protest since you state that "after the three payments were made and when the fourth was about due, several and perhaps all distributors orally protested that the method of figuring was wrong, and caused them to pay too much." Nothing appears in your letter as to when the distributors became cognizant of the claimed erroneous method of figuring other than the above statements to the effect that they made the payments with full knowledge of the facts, but the last above quoted language clearly indicates that no *protest* was made until after the payments in controversy had been made and when the fourth payment was about due.

There is another approach to this problem to which I desire to call your attention. As I understand it no objection is made on the basis that an error was made in the computations, themselves, resulting in the fixing of an erroneous price but that the error was in the *method* used growing out of what is now claimed to be a misinterpretation of the board's rules. I doubt whether such an error can be taken advantage of in a case like this. The board was authorized to fix the price of milk to the producer. This it did through its rules; but the interpretation of a rule is as much a part of the rule as the language of the rule itself and forms the basis of action of all persons concerned with its administration until the interpretation is changed. I am assuming, of course, that the interpretation is a reasonable one and not forced.

Passing now to your specific questions, if answers may yet be deemed necessary, I desire to take them up in an order different from the order of their statement.

First, as to the relation of the administrator to the fund, question No. 5. In my opinion, his relationship is that of a trustee to apply the same as provided in sub-section V (f) of Exhibit B attached to Official Order No. 2, *supra*.

Second, as to whether he has any legal right to comply with the demand for payment of the amount in controversy out of the funds he has or out of any fund, question No. 6. The answer to this question is on the assumption that a legal liability for repayment exists somewhere and as against somebody and it is without reference to what I have heretofore said on that subject. Answering said question, I desire to say that I know of no fund out of which the administrator may pay the demand. As pointed out earlier in this opinion, the equalization fund cannot be so used, and the language of sub-section V (f) of Exhibit B attached to Official Order No. 2, *supra*, clearly excludes such a use of the other fund considered in this opinion and in which there is now a balance of approximately \$5,000.00.

Your question No. 7 is answered in the negative.

On the basis of the answers to previously answered questions, your question No. 4 is answered in the negative.

Your questions Nos. 1, 2 and 3 present very apparent difficulty of categorical answer. The fund, referring to the fund originating out of payments to the administrator of small

fraction of a cent deductions from the figured price to producers, is a trust fund to be held by him and disbursed as provided in sub-section V (f) of Exhibit B attached to Official Order No. 2, *supra*, the terms of which, in my opinion, are reasonably clear. Said sub-section apparently contemplates that distribution when made to producers as provided in the last literary paragraph thereof is to be made to producers supplying the market in the "marketing area" at the time the distribution is made. These fraction of a cent deductions, in my opinion, are a part of the price so far as concerns the distributor, but they are no part of the price so far as the producer is concerned. The price to him is the price fixed by the board which the distributors are required to pay directly to him, and his interest in this particular fund grows out of and is realizable only by virtue of and pursuant to the provisions of the foregoing sub-section. Your questions Nos. 1, 2 and 3 are answered accordingly.

WELFARE, DEPARTMENT OF PUBLIC: Salary of county director, how fixed. Mandate: may county board be mandated to fix county director's salary.

March 22, 1937.

Hon. Wayne Coy,
Acting Administrator,
Department of Public Welfare,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion, in which you state in part as follows:

"The Welfare Act of 1936 provides that the salary of a County Director for a county the size of Marion County should be \$4,000 a year. Section 3 of House Bill No. 460, which has an emergency clause, provides that the compensation for County Directors shall be fixed by the County Board of Welfare, within the salary ranges established by the State Department, which shall be paid monthly in the same manner as the compensation of other county officers as provided by law.