

House Judiciary Committee Meeting
Monday, March 29, 1965

The House Judiciary Committee met Monday, March 29, 1965, in Room 523 at 1:00 P.M. with Chairman Jack R. Euler presiding. Fifteen members were present. Members Barnhill, Cram, Fatzer, Hill and Sargent were absent. Representative Tillotson was excused.

Chairman Euler called the meeting to order.

Richard L. Becker, Counsel, Dairy Institute of Kansas, gave a brief background concerning Senate Bill No. 47. He presented the members of the committee with a detailed comment, a copy of which is attached, in regard to this bill.

Chairman Euler explained the subcommittee's proposed amendments to House Bill No. 884, a copy of which is attached. Mr. Gray moved that the committee amend House Bill No. 884 as per the subcommittee's proposed amendments. Mr. Roberts seconded. Chairman Euler asked for any discussion. There was none. The motion carried unanimously.

Mr. Gray moved that House Bill No. 884 be reported favorably for passage as amended. Mr. Coldsnow seconded. Chairman Euler asked for any discussion. There was none. The motion carried unanimously.

Chairman Euler announced that there will be a hearing in reference to House Bill No. 1034 Wednesday morning, March 31, 1965, in Room 523 at 9:30 A.M.

Mr. Gray moved that Senate Bill No. 341, an act concerning existing K.S.A. 59-2213, amending said section to read in conformity with the new code of civil procedure, and repealing said existing section, be recommended favorably for passage. The motion was lost for lack of a second.

Mr. Foster moved the meeting be adjourned. Mr. Van Cleave seconded. The motion carried unanimously. The meeting adjourned at 1:45 P.M.

Respectfully submitted,
Jack R. Euler
Chairman

Minutes approved:



COMMENT ON SENATE BILL NO. 47

General Comment

In 1957 the legislature enacted a law prohibiting trade practices in the dairy industry which it felt were not in the public interest.

The Supreme Court of Kansas in the case of State ex rel v. Fleming Co., 184 Kan. 674, held unconstitutional the provisions prohibiting sales below cost and certain discrimination. The court found that the law did not have a proper definition of cost, proper unlawful intent and indefinite exceptions. In spite of the loss of these important provisions the 1957 act has been of some help to the industry.

In addition to the loss of these key provisions it has been apparent that effective enforcement requires the placing of enforcement responsibility and providing the means of investigation and enforcement.

This bill in attempting to cure these defects basically does three things.

First. It defines "cost" and the exceptions to selling below cost and to selling at different prices curing the deficiencies in the present law which caused the Supreme Court in the Fleming case to hold two sections unconstitutional. In other words, this bill we believe makes the present law constitutional.

Second. The dairy processor is required to file with the attorney general the prices for which he offers to sell his products and he is prohibited from selling below those prices, or less than his "filed price." The filed price cannot be below cost. The dairy processor by fixing his price for his product eliminates the uncertainty of price and many of the difficulties of proof.

Third. The dairy processor will pay fees to the Director of Revenue. The funds raised by these fees are appropriated to the office of the attorney general for the purpose of enforcing this law and the law of which it is amendatory.

In addition to these three basic provisions, there are some changes made in the trade practices which are prohibited which experience has demonstrated to be needed. These, however, do not materially change the present law.

Senate Bill No. 47 creates no new commission or office. It does not provide for enforcement by an administrative act or by license revocation or any enforcement process of a type not presently existing in our laws. (The registration with the director of revenue is revoked for failure to make monthly reports and pay the required fees.)

The act does in no way fix the prices. It does make it unlawful to sell below cost, at unreasonably low prices, or below the price which the dairy processor has fixed for himself.

The act in no way affects a person who is solely a retail dealer. The act does cover the retail operations of a person who is also a dairy processor insofar as his retail delivery or house to house routes are concerned. A dairy processor who also operates a retail store must file his "billing or transfer price" being the figure at which he carries the transfer from his processing operation to his retail operation. The person who is solely engaged in the business of operating a retail store is not in any way governed by the act. (Attention is called to sub-section (u) of Section 3 which begins at line 14 on page 7. This sub-section is presently the law. It probably does not enlarge the general law of "aiding and abetting." However, the legislature in 1957, wisely in our judgment, felt that there should be a specific provision which would prohibit a retailer from doing things for a dairy processor in an attempt to "cover up" or avoid detection of an improper act by a dairy processor.)

Section 50-504 - the misdemeanor provision of the 1957 Act is repealed. Enforcement will be by injunction only.

Section by Section Comment

Section 1.

K.S.A. 50-501, which sets out the general purposes of the existing law, is not repealed or amended. Section 1 of this act is an addition and supplement to the present K.S.A. 50-501 and is based upon an Oklahoma statute (15 Okla..S., 1961, §598.1 through §598.11) which has been held constitutional by the United States Supreme Court in the case of Safeway Stores vs. Oklahoma Retail Gro. Assn., 1959, 360 U. S. 334, L ed 2d 1280. It

was felt wise to follow a provision which had received the approval of the Supreme Court of the United States.

Section 2.

This amends the definition section of the present law (K.S.A. 50-502).

(a) The definition of dairy products is limited to "packaged" products and ice cream. Dry powdered milk and evaporated and condensed milk in hermetically sealed cans are specifically excluded. These products are not normally handled by a "dairy operation" and should not be governed by this act. The term "skim milk" was substituted for "milk without butterfat" as the term is already defined by statute K.S.A. 65-707 (A) (3).

(b), (c), (e) and (f) These definitions are retained as they are in the present statute.

(g) Cost is defined in detail in order that there would no longer be the indefiniteness which caused the Supreme Court to hold unconstitutional sub-sections (l) and (m) of section 50-503 of the present law. At least 90% of the milk going into packaged milk sold in Kansas is either directly or indirectly priced by a Federal market order.

(h) We have already mentioned the reason for "billing or transfer price" and for that reason it is necessary to define the term.

Section 3.

This is an amendment of K.S.A. 50-503 which is the section of the present law which defines the acts which are prohibited.

"Consumer." In (a), and other sections, the term "consumer" is deleted. It was deemed wise not to prohibit the furnishing of certain home equipment. There is being developed a type of home milk dispenser, for example, that it seems wise to permit the dairies to furnish to consumers.

(a) The use of the term "real or substantial value" was in our judgment so indefinite as to endanger the constitutionality of this sub-section and for that reason it is proposed to use the language, "anything

of value."

(a) and (b) The present law permits a dairy processor to sell to a retailer only ice cream cabinets and bulk milk dispensers. Experience has demonstrated that this limitation is too restrictive. Some of the larger companies have subsidiaries which deal in refrigerating equipment of this type and it has also been found that the equipment is of such specialized nature that it can best be obtained through those persons in the dairy business. It is felt that by placing the same restrictions on the manner of sale of all equipment, which the present law places on the sale of ice cream cabinets and bulk milk dispensers, the abuses in the furnishing of equipment will be eliminated. Consequently, the references to ice cream cabinets and bulk milk dispensers have been eliminated from both of these sub-sections. The result is that the dairy processor can sell equipment to a retailer, but it must be sold in a reasonable manner.

(c) The present law prohibits the furnishing of mechanical or electrical service on equipment used in connection with dairy products. Unfortunately, it has developed that some in the industry have, as a means of "buying" business, offered service on items of equipment not connected with dairy products. Consequently, it was deemed advisable to have a complete prohibition against furnishing mechanical or electrical service on any fixtures or equipment.

(d) The change in this sub-section is merely to improve the language.

(e) The present law permits the dairy processor to pay for certain newspaper advertising of a retailer. Compliance with this section is difficult to determine and enforce and subject to wide abuse. It is best to completely prohibit the dairy processor from paying for any advertising of the retail dealer.

(f) and (g) These sections are not changed.

(h) This change eliminates another indefinite term. In view of the position of the Supreme Court it was felt that the term "normal" was too indefinite for enforcement. A specific term is set out. The reason for the period of 46 days is this: It permits the billing on a full month

basis, including a 31-day month, and gives the retailer 15 days after the close of the month in which to make payment. In the operation of the trade, longer credit than this is not normally extended.

(i) (j) and (k) There are no changes in these sub-sections.

(l) This is one of the two sub-sections which the Supreme Court held unconstitutional. The court held that the lack of definition of cost made the section unconstitutional. As previously noted, cost has been defined and this fatal weakness no longer will exist. The court also criticized the lack of "intent" in the present law. This sub-section prohibits the sale below cost "in contravention of the policy of this act" which is spelled out in section 1.

Attention is called to the proviso which permits a dairy processor to sell below his cost to meet the filed price of a competitor, which of course, cannot be below the competitor's cost. The Supreme Court of the United States has held that a merchant can be prohibited from meeting an unlawful price of a competitor (Safeway Stores V. Oklahoma Retail Gro. Assoc., previously mentioned.)

(m) This is the other sub-section which was held unconstitutional by the Kansas Supreme Court. It now has the necessary "intent" by reference to the policy of the act and permits the meeting of competitive lawful prices. An indefinite feature has been eliminated by using the county as the area in which the price must be uniform. This section should meet the test of constitutionality. The last sentence permits differences in prices between purchasers if they are justified by the difference in cost to the dairy processor due to volume, manner of delivery, etc.

We call attention to the fact that language in the present sub-section relative to selling to federal institutions is deleted. However, this exemption remains in the law and appears in Section 5.

(n) This is a new sub-section. It is possible that the problem covered by this section might be an offense under previous sections but it is best that it be spelled out. It is found that some wholesalers will do this, for example: they will deliver to the retailer three cases

of milk and charge him with only two. This type of a practice is specifically prohibited.

(o) This is a new prohibition in the language of Robinson-Patman Act (15 USCA §13a) which was upheld by the Supreme Court of the United States in U.S. v. National Dairy products Corp., 1963, 372 US 29, 9 L ed 2d 561, 83 S Ct 594. A price may be at the dairy processors cost, even slightly above, but be such that only a dairy processor with tremendous resources and a predatory desire could maintain the price and destroy his competitors. The portion stating "with the effect of" is from the Clayton Act.

(p) This is new and is to prohibit the avoidance of the prohibition against selling below cost by gifts of any type from the dairy processor which have the result of either reducing the price below cost or making its determination difficult or impossible.

(q) This sub-section is added to make effective the provision relative to the filing of prices and is a basically new prohibition in the act. The price he files must mean something.

(r) The filed price must be a price for which he could lawfully sell his product. He should not be permitted to file a price which was below his cost--even though he might not sell at that price.

(s) It is found that some dairy processors follow the practice of reducing their sales price under the guise of giving "samples". There is no desire or reason for prohibiting good faith in-store sampling of the product, but a three ounce sample is ample to enable a prospective purchaser to test the flavor or quality of the product being sampled.

(t) This sub-section is necessary in order to make effective the provision for collecting the fees to raise the funds for enforcement of the act.

(u) This is section (n) of the present law.

Section 4.

This is an amendment to K.S.A. 50-505. The change gives a person damaged because of unlawful action the right to recover treble damages. The language follows that in the United States statute allowing treble damages for injuries resulting from violation of fair trade laws (15USCA §15).

Section 5.

This is the section which requires the dairy processors to file their schedules of prices with the office of the attorney general. The office of the attorney general was selected as he is the one who will enforce the law and the information relative to these items logically is made available there. The price schedule is not public. It is available to a registered dairy processor. He should have this information available in order that he would not have to act on rumor or unreliable information in determining whether he is in fact meeting a competitor's lawful price, in determining whether or not complaint should be made as to a competitor's selling practices.

So long as the price which he files is not below his cost, the dairy processor may have any price that he desires. He may have a price for separate counties in which he does business. He, of course, is prohibited from varying his price between retailers within the same county. It seems wise to make the sales areas specific and county lines should be the most practical.

A change of price must be filed seven days before its effective date and a change cannot be made until the price has been in effect at least ten days, except where the change has been made to meet a price as provided by Section 3 (1). A stability in price is encouraged which will be beneficial to the consumer, the producer and the industry. As previously noted, this section contains a provision that the seller of dairy products is not precluded from selling at any price he desires to an agency or department of the United States government. A recent decision of the United States Supreme Court, passing on a California statute, held that a provision limiting the price below which sales could not be made, could not be made applicable to the United States government.

Section 6.

This section specifically enjoins upon the attorney general the duty to investigate and prosecute alleged violations of this act and authorizes him to employ necessary personnel, including assistant attorneys general, for the purpose. As the criminal feature is repealed, enforcement will be by injunction.

Section 7.

This section requires each dairy processor pay a registration fee of \$5.00 to the Director of Revenue. As the fees designed to support enforcement of the act are to be collected by the Director of Revenue, it was deemed proper to require the parties concerned to register with the director so that there would be an account set up through which payment of the fees could be checked and determined.

Section 8.

This is the section which sets out the monthly fees to be paid for the purpose of supporting investigation of alleged violation and the enforcement of the act.

These fees will be paid by the dairy processor and cannot be passed back to the producer.

The bill provides that the fees cannot exceed the amount stated. It is the responsibility of the attorney general to reduce the fees when the amount of income exceeds that necessary to enforce the law.

The director of revenue is directed to revoke the registration of a dairy processor who fails to make his reports and pay the applicable fees.

Section 9.

The usual 20% of the funds are to be paid into the General fund. Eighty percent goes to the office of the attorney general.

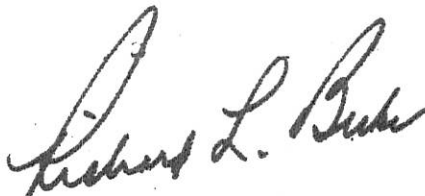
The best estimate that we have been able to make is that this fee would produce approximately \$85,000 which would make available to the attorney general's office \$68,000 a year.

It is believed that with funds for adequate investigation and enforcement the attorney general's office will within a year or two be able to substantially reduce the fees as those in the industry who might be inclined to violate these laws, having learned that they will be enforced, will voluntarily comply. The provision for treble damages, it is believed, will be strong deterrent to violations of the act.

Section 10.

Section 50-510 is amended in substance in one particular only. The act and the law of which the act is amendatory are designed to apply to

the business of dealing in dairy products only and it was desired to continue this restriction. However, problems have arisen where a processor of dairy products would sell another item of merchandise as a unit with a dairy product and this particular situation is specifically covered for enforcement of the law.

A handwritten signature in cursive script, reading "Richard L. Becker". The signature is written in dark ink and is positioned above a horizontal line.

Richard L. Becker, Counsel
DAIRY INSTITUTE OF KANSAS

said officer shall forthwith release the person arrested from custody.

"(2) Notwithstanding any other provisions of this section or of this act, whenever any person shall be arrested for the violation of any of the provisions of the ordinance of any city defining any offense described in subsection (1) of this section and such person is not given an immediate hearing as hereinbefore provided upon the adoption by the city of an ordinance authorizing and prescribing the amount of bond which may be required for designated offenses, the arresting officer may require the person so arrested to give bond in the amount specified in such ordinance for the offense for which arrested which bond shall be subject to forfeiture if said person so arrested does not appear for trial at the time specified in the written notice provided for in subsection (1) of this section. Such bond shall be a cash bond and shall be taken in the following manner: The arresting officer shall furnish the person arrested a stamped envelope addressed to the judge and the person arrested shall place in such envelope the amount of the bond, and in the presence of the arresting officer shall deposit the same in the United States mail.

"(3) The offenses for which appearance bonds may be required as provided in subsection (2) of this section and the amounts thereof shall be prescribed by ordinance of the city.

"(4) In the event of forfeiture of any of the bonds authorized by the provisions of this section, then five dollars (\$5) of said forfeited bond shall be regarded as court costs."

On page 6, line 24, by striking the following: "8-5,129,";

In line 4 of the title by striking the following: "8-5,129,";

And that the bill be passed as amended.

Chairman.