

exempt from the provisions of the Milk Control Act.

4. "Fluid milk" as used in line 7 of Section 9, of the Act, does not mean cream.

5. The Board does not have power to refuse to allow new applicants to enter into the business of the purchase and sale of milk.

July 1, 1935.

Mr. G. A. Norris  
Commissioner, Montana Milk  
Control Board  
The Capitol

You have submitted the following:

"1. On the 24th day of June, the government officials at Fort Harrison, Montana, called for bids on fluid milk and cream from July 1, 1935, to June 30, 1936.

"All the bidders had been fully advised regarding the Montana Milk Control Board setup and also with regard to the schedule of prices as adopted by the Helena trade area. There were five bidders for this business with the Federal Government officials at Fort Harrison. All complied with the schedule of prices as understood by them, with the exception of one bidder."

You ask whether the bidders for the contract to supply Fort Harrison, are bound by the prices adopted by the Helena trade area or zone.

Chapter 189, Laws of 1935, declaring a public emergency exists, provides for the creation of the Milk Control Board, with power to supervise, regulate and control the distribution and sale of milk for consumption within the state, and after hearings and investigations, to fix minimum prices to be paid to producers by milk dealers, as well as minimum wholesale and retail prices to be charged for milk. The statute makes no exception for milk dealers who buy milk for the purpose of supplying a federal agency such as Fort Harrison. It applies to all milk dealers alike, regardless of the trade they supply. In the absence of any express provision in the statute to the contrary, we are compelled to hold that it was the intention of the legislature

**Opinion No. 132.**

**Milk Control Board—Federal Agency,  
Regulating Contracts of—Minimum  
Prices—Cream—Rules and  
Regulations.**

HELD: 1. Chapter 189, Laws of 1935, creating the Milk Control Board, applies to milk dealers who buy milk for the purpose of supplying a Federal agency.

2. Whether the Milk Control Board may regulate the sale of fluid milk or cream coming into an established trade area from an outside source, should be considered in connection with the particular facts bearing upon the situation.

3. Cooperative associations are not

to make no exceptions and that the minimum price must be paid to producers of milk, regardless of the purpose of the purchase.

The state has, under its police power, full authority to regulate its internal commerce in milk even to the extent of fixing prices for its sale. (*Nebbia v. New York*, 291 U. S. 502; *Reynolds v. Milk Commissioners of Virginia*, 179 S. E. 507; *Royal Farms Dairy v. Wallace*, 8 Fed. Supp. 975.) In the *Nebbia* case, the court speaking by Mr. Justice Roberts, said:

"The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. \* \* \* But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells. \* \* \*

"Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt and hence an unnecessary and unwarranted interference with individual liberty." (pp. 536-539.)

In *Eubank v. Richmond*, 226 U. S. 137, the court said of the police power: "It extends not only to regulations which promote the public health, morals and safety, but to those which promote the public convenience or the general prosperity \* \* \*. It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."

See also *Noble State Bank v. Haskell*, 219 U. S. 104 and *Willoughby on the Constitution of the United States*, page 1774.

The act operates directly upon the producers and dealers within the state who do business within the state. It does not interfere with matters that are within the exclusive scope of federal power. The proper exercise of the police power by a state is not to be denied even though it may have an indirect or incidental effect upon federal powers. *Robbins v. Shelby Coun-*

*ty Taxing District*, 120 U. S. 489, 492; *Western Union Telegraph Co. v. James*, 162 U. S. 650; *New York Etc. Rd. Co. v. New York*, 165 U. S. 628; *Lake Shore Etc. Co. v. Ohio*, 173 U. S. 285; *Missouri Pac. Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612; *Houston & Texas R. Co. v. Mayes*, 201 U. S. 321; *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 334.

"2. When a trade area has been completed, is it possible for the local trade area in cooperation with the Milk Control Board to exercise its authority in having full supervision of any fluid milk or cream shipped into such trade area from an outlying trade area located within the confines of the State? In other words, can the Milk Control Board regulate the sale of fluid milk or cream coming into an established trade area from an outside source?"

No facts are presented and it is difficult, if not impossible, to answer an abstract question. As we construe the Act, Section 7 (a), the board may fix the minimum prices in each zone or trade area, having regard to the factors mentioned in said Section 7. In fixing such minimum prices the board naturally should take into consideration the cost of production of milk in and the cost of shipment of milk from the nearby or adjoining zones. Whether the milk control board may regulate the sale of fluid milk or cream coming into an established trade area from an outside source, should be considered in connection with the particular facts bearing upon the situation. A legal conclusion must be based on some definite facts. In the absence of such facts we believe it inadvisable to attempt to lay down a general rule.

"3. In what way can a cooperative association be limited from buying milk in a trade area, and how can they be controlled when buying milk in one trade area and selling it in another trade area? Continuing this question, I respectfully refer you to Section 10 of the Act which has been discussed by the Board, and the Board having decided that it is not interested in what manner the cooperative shares the profit, but when dealing with individuals that they are subject to Milk Control Board

rules; in other words, it was decided that this section of the bill regulates a cooperative association in the same manner that it does any other organization, individual or collective."

Since we are not familiar with the operating methods of cooperative associations, and no concrete facts are presented, we believe it would be inadvisable to attempt to draw any legal conclusion in answer to the first sentence of your question. In general, we may say that we agree with you that cooperative associations are not exempt from the provisions of the Act.

"4. In line 17, Section 3, of the law, please define what is milk and does the word milk also mean fluid cream. Applying line 17, Section 3, to the fee schedule, Section 9, does the word fluid milk in line 5 of Section 9 mean cream?"

Section 1 defines "milk" as follows: "Milk means fluid milk and cream sold for consumption as such." While "milk" as defined by the Act, is a generic term including both fluid milk and cream, the statute does not say that fluid milk is cream; that they are separate commodities is recognized by the statute. We conclude, therefore, that the word "fluid milk" in line 7 of Section 9, Chapter 189, as printed in the Laws of 1935, does not mean cream.

"5. Does the Board have jurisdiction in cases where new applications are received for entering into the fluid milk and cream business? Can the Board at its discretion, allow or refuse the applicant to enter into business by persons not already engaged in the distribution and sale of wholesale and retail milk and cream?"

The purpose of the Act is to regulate prices. Nowhere in the Act do we find any expressed intention on the part of the legislature to give power to the Board to establish a monopoly by refusing to allow new applicants to enter into the business of the purchase and sale of milk.

Note: See State of New Jersey ex rel. State Board of Milk Control v. Newark Milk Co., N. J. Court of Errors and Appeals, 179 Atl. 166.