

STATE OF NORTH CAROLINA
WAKE COUNTY

11/70
BEFORE THE
NORTH CAROLINA MILK COMMISSION

REMARKS OF ROBERT MORGAN
ATTORNEY GENERAL OF NORTH CAROLINA

First, I wish to apologize to each of you for making my appearance in absentia but a prior commitment requires that I be out of town today. However, I have directed my assistant, Mr. Leggett, to give my presentation for me.

Before getting into the body of my remarks and observations, I particularly want you to note that Mr. Leggett's appearance today is not an intervention in the matter as an adversary. Instead, he appears only to express my views.

You may be interested to know, that after careful consideration of the matter, I have directed Mr. Benoy who heads the Consumer Protection Division of my office, not to intervene in your proceedings at this time.

I have met with Mr. Whitaker, your executive secretary and Mr. Benoy. I have addressed myself to your remarks at your last meeting and appreciate your invitation to me to appear before you and express my views in regard to Fair Trade Order No. 10.

This order relates to the marketing of milk; and milk is a food product vital to our citizens' health and well-being. It has been termed "nature's most nearly perfect food."

Recognizing this fact, in 1953, our General Assembly instituted a program whose goal is to insure our citizens will have available to them at all times a sufficient supply of this vital food product at prices which are fair and reasonable to the public as well as the producer.

The General Assembly placed the responsibility for carrying out its

program principally on the Milk Commission. This agency has determined that the goal established by the General Assembly can be reached best by assuring a continuous home-grown supply of milk for our citizens. To accomplish this you have determined that the cornerstone of your regulation is to provide marketing stability for the milk producer, that is, the dairy farmer.

I agree that your determination to protect and stabilize the market for dairy farmers is both desirable and proper. I agree that with stability at the producers level the foundation is laid for achieving the goal of the General Assembly.

I am forced to agree because I recognize that the dairy farmer produces the most perishable food commodity on the market today. I also recognize that the dairy farmer must make a continuing and a fairly more substantial investment in his farm, his herd and his milking equipment than is required of his neighbors engaged in other farm activities. The dairy farmer, daily, must meet standards of sanitation in his farming operation substantially higher than any of his other neighbors engaged in farming.

I further recognize that the nature of the milk producing animal requires constant year-round attention to insure a producing unit and this requires greater continuing outlays of capital to pay for labor on a year-round basis.

The combination of all these factors has made the milk producer more susceptible to unfair and damaging trade practices in the production and marketing of his product than any other single industry I know of.

Certainly the monopolist covets no industry more than the milk industry, because of its vital role as a food necessity and because it is the industry most susceptible to predatory trade practices.

So, I am in agreement with the goals set by this Commission to protect the public from monopoly power, and to eliminate unfair trade practices which tend to lessen and stifle competition in the marketing of milk in North Carolina. These are the same goals we are seeking in all lines of trade and commerce in this State. The goals are the same in all antitrust laws whether they be state or federal. I notice in Milk Commission vs. National Food Stores that Dr. Lake stated "The Commission was established as a State Agency to protect the interest of the [consuming public] in a regularly flowing supply of wholesome milk. . ." and that "it is the destruction of competition in the handling of milk. . ." which [the law] was designed to prevent."

It appears to me that the law's aim is to prevent the destruction of competition in the handling of milk. . . not to prevent competition in the handling of milk.

We see then, that what you are administering here are in truth, the state's antitrust laws in a specific area limited to the marketing of milk in this state.

There is no disagreement between the Milk Commission and the Attorney General's office when we are talking about the desirability of enforcing a public policy established by our laws which are designed to promote and foster open and fair competition in the marketing of goods and products in this State.

To illustrate that no antagonism need exist between the goals of the Commission and my office, in this respect, I note it is my specific statutory duty to enforce the antitrust laws in the State of North Carolina. These duties have been placed upon my office since 1913 when the State's antitrust laws were first enacted.

You will notice that in your own statute if you determine there has been a violation of the milk laws then it is my duty to institute court actions upon your request with respect to any of those alleged violations.

I would like to further illustrate that our ultimate interests in fair

trade practices in the State are in complete harmony and agreement. The first major change I made in the organization of the Attorney General's Office was to establish a Consumer Protection Division. One of the specific duties which I placed upon this Division was the enforcement of the State and Federal antitrust laws in the State of North Carolina. In fact, one of the first actions which was instituted by me was an antitrust action.

To further illustrate my interest in this field, one of the first additions to my staff was Mr. Benoy, who is trained in the antitrust field at both the federal and the state levels.

As a last illustration, I would like to report to you that in my private practice I was engaged as counsel in several antitrust law suits for North Carolinians who felt they had been injured by trade practices carried on to lessen competition or establish a monopoly.

I use these illustrations to demonstrate that I am before you, not as a protagonist, but as a public officer whose natural inclinations place him in sympathy with the goals you seek to accomplish.

However, since coming into office in January of this year, one of my most frequently heard complaints has related to the high price of milk in North Carolina.

I had been in office less than two months when public officials complained to me about the system of bidding for milk used in our public schools.

Therefore, in April I directed the Consumer Protection Division to investigate the matter and report

the results to me. I have personally reviewed the evidence and I have concluded to my own satisfaction that the present provisions of Fair Trade Order No. 10 effectively eliminate any real competition in the marketing of milk in North Carolina.

I do not charge that this result flows from a deliberate plan by the Commission. Nothing could be farther from the truth.

Yet duty compels me to speak out when the results are as clear and unequivocal as are the results of this order.

Probably no single provision of the order, standing alone, would accomplish the complained of results; but the cumulative effort of all its provisions rules out any effective competitive influence from entering into the marketing of milk in this state.

First - The order requires milk processors and distributors to publicly file their prices. Then it requires at least ten days' advance notice be given to the Commission and to all competitors of the milk processor before the processor may change his price.

Second - It permits any processor who receives a notice of price change from his competition to lower his price on one day's notice to the same price as his competitors. The necessary results of these provisions are to eliminate any price competition and these provisions do not relate to protection of the milk producer.

Third. It prohibits a new entrant into the milk processing business to compete by giving better service than his established competitor through loans

of equipment or the rendering of additional service to induce retailers to use the new entrant's products in addition to the established competitor.

The order has failed to distinguish between the legitimate use of furnishing additional equipment, services, discounts and lower prices, which can be used to foster fair competition in the marketplace; from the use of these same tools of trade by a processor who already has a dominant place in the market to drive his smaller competition and the new entrant out of business.

It is the latter use of these tools of competition which is condemned by our antitrust laws as well as the Milk Commission's laws.

The order fails to recognize that it is not the tools of the trade which are prohibited but the use of the tools in a manner and with the intent to drive out competition which is proscribed.

The order assumes, without justification in my opinion, that the use of these tools of competitive trade are mala in se.

I disagree and feel that the approach in prohibiting a competitor from using an otherwise lawful tool of trade should be done only upon proof in an open hearing that the competitor was attempting to use these tools to injure or eliminate competition in his particular marketing area.

I believe this is what the law provides for, and I feel that rules of the Commission should be consistent with the basic law of this State.

Fourth. I believe that public institutions should have and are entitled to have the benefits of the secret, sealed competitive bid. The provisions of the order do not prevent the submission of a sealed bid, but it requires the bidder to bid only his posted prices unless he gives ten days notice of the new

(prices he intends to bid to the Commission and to his competitor.

The order further provides that any competitor may then submit bids on a one-day notice of change of price.

The result has been uniform price bidding for the school's milk requirements throughout the state except to military bases (when the order is not followed) and when the court has enjoined the enforcement of the order by the Commission.

Non-collusive uniformity would not be bad per se, but when the milk processors are able to bid competitively, the prices are substantially and consistently lower.

(Finally, the provisions of the order provide for uniform and successively higher discounts to be given to the larger buyer without regard to cost justification features. Such provisions work only to the benefit of the large retailer and chain-type markets while working to the disadvantage of the small neighborhood and independent grocer.

Here again, the provisions of the order fail to take into consideration that in some instances no discounts are justifiable by an honest processor, while in some instances, discounts are legitimate tools of competition and can be used to promote fair competition.

I am forced then to conclude the practical effects of this order are twofold:

(1) It eliminates competition in the marketing of milk, and this result is contrary to the intent of the law; and having eliminated competition.

(2) It tends to set the prices at an artificially high level, which is a result desired by no one; the producer, the processor, the retailer, nor the public.

It is an unassailable fact that the cost of milk to the North Carolina consumer is among the highest in the nation while his wages are among the lowest. It is apparent there is an imbalance somewhere in the scheme of the milk marketing plan.

I do not know exactly where or how the imbalance has come about. I certainly do not claim that such has been deliberately planned.

I do not claim to know what kind of order should be written to rectify the situation. I seriously question if anyone knows.

So I suggest to the Commission that the milk producer has a substantial protection at this point in time and we recommend that orders of the Commission relating to the base price for Class I milk to be paid the producer be left as is.

I recommend that Fair Trade Order #10 be rescinded in toto and let the competitive forces in the marketing of milk in North Carolina determine the prices which the consuming public must pay for milk.

Lastly, I respectfully call your attention to the fact that we are active in the field of antitrust law enforcement in this state for the first time in the state's history.

If at any time you feel that particular practices are being engaged in by members of the dairy industry which tend toward monopoly or which are unfair methods of competition, I have a staff of five attorneys and four accountant-investigators who are ready, willing, and able to assist you if you desire, to investigate and, if necessary, prosecute such violations of the laws.

I believe the better way to handle the few who would violate our laws by attempting to establish a monopoly, or engage in trade practices to injure his competitor is to prosecute the violators on a case-by-case basis, and that such prosecutions should be based upon evidence demonstrating the wrongful intent to injure or eliminate competition.

I believe that the broad scale taking away of the milk processors' and distributors' rights to use legitimate tools of trade in a lawful manner is an unwarranted interference of these people's rights and an unjustified slur upon their character and integrity as businessmen, and as North Carolina citizens.