

Clearinghouse Rule 96-009

STATE OF WISCONSIN)
) ss.
DEPARTMENT OF AGRICULTURE,)
TRADE AND CONSUMER PROTECTION)

Clearinghouse Rule
No. 96-009

CERTIFICATION:

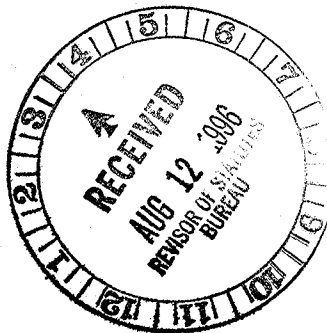
I, Alan Tracy, Secretary of the Wisconsin Department of Agriculture, Trade and Consumer Protection and custodian of the department's official records, hereby certify that the attached rulemaking order relating to producer payroll statements and price discrimination in milk procurement was signed and adopted by the Department on August 12, 1996.

I further certify that I have compared the attached copy to the original on file in the department, and that the attached copy is a complete and accurate copy of the original.

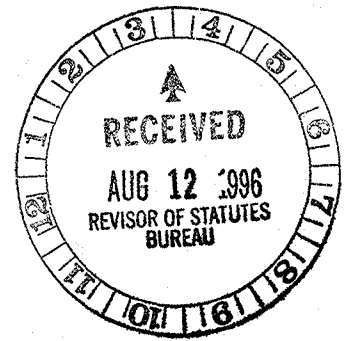
Signed and sealed this 12th day of August, 1996.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By *Elizabeth Kohl*
Deputy Secretary
Alan T. Tracy, Secretary



10-1-96



**ORDER
OF THE STATE OF WISCONSIN DEPARTMENT OF
AGRICULTURE, TRADE AND CONSUMER PROTECTION**

1 The state of Wisconsin department of agriculture, trade and
2 consumer protection amends chapter ATCP 100(note), repeals and
3 recreates ATCP 100.75, and creates ATCP 100.76(3m) and subchapter
4 VI of chapter ATCP 100, relating to payroll statements to milk
5 producers and price discrimination in milk procurement.

**Analysis by the Department of
Agriculture, Trade and Consumer Protection**

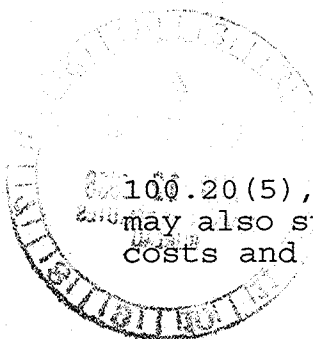
Statutory authority: ss. 93.07(1), 93.15, 97.20(4) and
100.20(2), Stats.

Statutes interpreted: ss. 93.15, 97.20, 100.06, 100.20 and
100.22, Stats.

This rule does all of the following:

- Prohibits a dairy plant operator from discriminating between milk producers in the amount paid for milk unless the discrimination is based on a difference in milk quality, is justified by a difference in procurement costs, or is justified in order to meet a competitor's price.
- Establishes standards which a dairy plant operator must meet in order to claim the milk quality exemption, or to establish a defense based on cost-justification or meeting competition.
- Spells out enforcement standards and procedures. The department may require a dairy plant operator to file documentation justifying discriminatory prices, and may take enforcement action against an operator who fails to provide adequate justification.
- Makes technical changes in current rules related to milk producer payroll statements. The changes are intended to accommodate the new "multiple component" pricing method now used under federal milk marketing orders.

The department may ask the attorney general or a district attorney to prosecute price discrimination violations in court, and may take action against a violator's dairy plant license. Under s.



100.20(5), Stats., a producer or competitor injured by a violation may also sue the violator directly, and may recover double damages, costs and reasonable attorney fees.

BACKGROUND

Each year, Wisconsin's 27,000 dairy farmers sell nearly \$3 billion worth of milk to dairy plant operators. Milk sales represent the primary or exclusive source of income for thousands of Wisconsin farm families.

Currently, many dairy plant operators appear to be discriminating between milk producers in the amount paid for milk. Many operators appear to be paying higher prices to some producers which cannot be justified on the basis of milk quality or differences in procurement cost. Discrimination in milk prices may injure other milk producers and competing dairy plant operators, and may contribute to unwarranted concentration in the dairy industry.

Section 100.22, Stats.

Section 100.22, Stats., currently prohibits a dairy plant operator from discriminating between milk producers in the amount paid for milk if the discrimination injures producers or competition. However, the law affords the following exemptions and affirmative defenses:

- The law does not prohibit discriminatory prices based on measurable differences in milk quality. Milk quality premiums, if any, must be based on a pre-announced premium schedule which the operator makes available on equal terms to all producers. The operator must also comply with minimum testing requirements under s. ATCP 80.26, Wis. Adm. Code.
- An operator may defend a discrimination charge by proving that the discrimination is justified by a difference in procurement costs.
- An operator may defend a discrimination charge by proving that the operator was merely "meeting competition."

The department may investigate violations of s. 100.22, Stats., and may request the attorney general or a county district attorney to prosecute violations in court. However, investigation and prosecution are currently hampered by a lack of clear standards in the law. For example, there are no standards for what constitutes "cost-justification" or "meeting competition." Although the department has adopted temporary emergency rules, there are no "permanent" rules interpreting s. 100.22, Stats.

Section 100.20, Stats.

Section 100.20, Stats., Wisconsin's "Little FTC Act", broadly prohibits unfair trade practices and methods of competition in business. Under s. 100.20(2), Stats., the department may adopt rules prohibiting unfair trade practices and methods of competition, and requiring fair practices. The department has previously adopted rules under s. 100.20(2), Stats., prohibiting price discrimination related to fermented malt beverages, soda water beverages and motor fuel. The department is adopting this rule under authority of s. 100.20(2), Stats., and other applicable law.

Enforcement Options

Under s. 100.20(5), Stats., a person who suffers a monetary loss because of a violation of a rule adopted under s. 100.20(2), Stats., may sue the violator in court, and may recover twice the amount of the loss together with costs and reasonable attorney fees. That private remedy is applicable to violations of this rule.

The department may also ask the attorney general or county district attorneys to pursue violations in court, or may pursue administrative proceedings to suspend or revoke a dairy plant operator's license.

RULE CONTENTS

Price Discrimination Prohibited

This rule prohibits a dairy plant operator from doing either of the following if the operator's action injures competition or injures any producer:

- Discriminating between producers in the milk price paid to those producers. "Milk price" means a producer's average gross pay per hundredweight, less hauling charges.
- Discriminating between producers in the value of any non-price consideration which the operator furnishes to those producers but does not include in the payroll price.

Exemptions

This rule does not prohibit a dairy plant operator from doing any of the following:

- Paying a different price for grade A vs. Grade B milk.
- Complying with a federal milk marketing order.
- Properly charging a producer for costs which the dairy plant

operator incurs because of the producer's violation of ch. ATCP 60, Wis. Adm. Code (Dairy Farms).

- Paying different milk prices to producers based on actual differences in the quality of their milk, or based on actual differences in the *percentage* of milk components in their milk, provided that all of the following apply:
 - * The dairy plant operator pays for milk quality, or milk component percentages, according to a written payment schedule which the operator announces and makes available on equal terms to all producers from whom the dairy plant operator buys milk.
 - * The milk quality or milk component payment schedule clearly indicates the amounts by which payments will vary based on actual differences in milk quality, or based on actual differences in milk component percentages.
 - * The dairy plant operator measures the differences in milk quality or milk component percentages using accepted scientific methods.
 - * The payment schedule does not discriminate between producers having the same milk quality, or the same milk component percentages in their milk.
 - * Milk quality and milk component payments are not based on milk volume or restricted to certain producers based on volume. (Milk component premiums are not exempt if they are based on the total volume of milk components delivered, rather than milk component *percentages* in milk.)
 - * The dairy plant operator complies with ss. ATCP 80.26(2) and 100.75.

Cost-Justification Defense

Under this rule, a dairy plant operator may defend against a milk price discrimination charge by proving that the discrimination between producers or pay classes was fully justified by a difference in relevant procurement costs between those producers or pay classes. Proof must be based on documentation which the operator possessed and relied upon at the time of the alleged discrimination.

The rule spells out:

- Relevant procurement costs which the operator may use to justify discriminatory payments.

- The methods by which the operator must allocate those procurement costs to individual producers and pay classes for cost-justification purposes.

Under this rule:

- If a dairy plant operator pays milk volume premiums based on total volume, but not volume per pickup, the operator must justify discriminatory payments based on per-hundredweight differences in "producer service costs." "Producer service costs" include dairy farm field service costs, milk testing costs, costs to prepare and record producer payrolls, dairy farm license fees and like expenses.
- If a dairy plant operator pays milk volume premiums based on volume per pickup, but not total volume, the operator may combine "producer service costs" and "pickup costs," and may justify discriminatory payments based on differences in those combined costs. "Pickup costs" include costs to collect milk from dairy farms. "Pickup costs" do not include collection or hauling costs charged to producers, nor do they include transportation or hauling costs except between farms on the hauling route.
- If a dairy plant operator pays milk volume premiums based on total volume and volume per pickup, the operator must:
 - * Justify discrimination in total volume premiums based on per-hundredweight differences in "producer service costs."
 - * Justify discrimination in per-pickup volume premiums based on per-hundredweight differences in "pickup costs."

Meeting Competition Defense

Under this rule, a dairy plant operator may defend against a discrimination charge by proving that the discrimination was justified in order to meet competition. A dairy plant operator may not claim this defense unless the operator proves all of the following, based on documentation which the operator possessed and relied upon at the time of the alleged discrimination:

- The operator made the offer in order to meet a competitor's prior offer to producers in the operator's procurement area.
- The competitor's prior offer was still in effect when the operator met the competitor's offer.
- The operator's offer was similar in kind to the competitor's offer, and did not exceed the competitor's offer.

- The operator made the offer only in that part of the operator's procurement area which overlapped the competitor's procurement area, or only to those producers who received the competitor's offer.

No dairy plant operator may claim the meeting competition defense under this rule for either of the following:

- A milk volume premium which exceeds, for producers shipping equivalent volumes of milk, the milk volume premium offered or paid by the competitor whose competition the operator is purporting to meet.
- Discrimination which occurred more than 30 days after the last day on which the competitor's offer was in effect.

Demanding Justification

Under this rule, the department may require a dairy plant operator to file documentation justifying a payment or offer which appears to discriminate between milk producers. A dairy plant operator must file the documentation within 14 days after the operator receives the department's demand, or by a later date which the department specifies in its demand. The department may extend the filing deadline for good cause shown.

Failure to Justify Discrimination; Notice

Under this rule, if the department finds that a dairy plant operator has not adequately justified a payment or offer which appears to discriminate between milk producers, the department may give the dairy plant operator written notice of that finding. The notice is open to public inspection under subch. II of ch. 19, Stats.

This notice is not a prerequisite to an enforcement action against the violator, nor is it a prerequisite to a private action by an injured producer or competitor. The notice does not prove that the dairy plant operator violated this rule or s. 100.22, Stats.

Injury to Producer

This rule provides that in an administrative or court enforcement action, or in a private lawsuit under s. 100.20(5), Stats., evidence that a complaining producer was paid less than another producer shipping milk to the same dairy plant during the same pay period is presumptive evidence that the complaining producer has been injured.

Producer Payroll Statements

Under current rules, a dairy plant operator must give each milk

producer a written payroll statement for each pay period. The payroll statement documents the amount of milk received from the producer during the pay period, the amount paid for that milk, and the basis on which the pay price was determined. Among other things, the payroll statement identifies the nature and amount of any price adjustments, including any premiums or deductions.

Effective January 1, 1996, federal milk marketing orders changed the way that many dairy plant operators pay milk producers. The milk marketing orders provide for a new method of payment called "multiple component" pricing.

This rule repeals and recreates current rules related to milk producer payroll statements, so that payroll statement requirements will be consistent with the new "multiple component pricing" method. This rule also spells out alternative payroll statement requirements for dairy plant operators who continue to use the traditional "straight fat" or "3.5% butterfat differential" pricing methods.

1 **SECTION 1.** Chapter ATCP 100(note) is amended to read:

2
3 NOTE: This chapter interprets ss. 93.15, 97.20, 100.06 and,
4 100.20 and 100.22, Stats. Violations are subject to
5 civil and criminal penalties the sanctions provided under
6 ss. 93.21(4), 97.72, 97.73, 100.20, 100.22(4) and (5),
7 100.24, and 100.26(3), (5) and (6), Stats. Violations of
8 this chapter may also result in the restriction,
9 suspension or revocation of a dairy plant license
10 sanctions under ss. 93.06(7) and (8) and 97.20, Stats.
11
12

13 **SECTION 2.** ATCP 100.75 is repealed and recreated to read:

1 **ATCP 100.75 PAYROLL STATEMENTS TO MILK PRODUCERS.** On each
2 producer pay date, a dairy plant operator shall provide each
3 producer with a written payroll statement that includes all of the
4 following information:

5 (1) OPERATOR IDENTIFICATION. A producer's payroll statement
6 shall include the name and address of the dairy plant operator.

7 (2) PRODUCER IDENTIFICATION. A producer's payroll statement
8 shall include the producer's name and identification number.

9 (3) PAY PERIOD. A producer's payroll statement shall specify

1 the milk delivery dates, or pay period, for which payment is being
2 made.

3 (4) MILK VOLUME. A producer's payroll statement shall
4 specify the total weight of milk, in hundredweights, which the
5 dairy plant operator received from the producer during the pay
6 period.

7 (5) GRADE OF MILK. A producer's payroll statement shall
8 specify the grade of milk which the dairy plant operator received
9 from the producer during the pay period.

10 (6) MILK TEST RESULTS. If the price paid to the producer is
11 affected by test results related to milk components, milk quality
12 or other variables, the producer's payroll statement shall include
13 a statement of all test results used to determine the pay price
14 unless the dairy plant operator has already furnished those test
15 results to the producer.

16 (7) MILK PRICE AND ADJUSTMENTS. A producer's payroll
17 statement shall include the following price information, as
18 applicable:

19 (a) Payment based on straight fat. If the dairy plant
20 operator is paying the producer on a straight fat basis, the
21 producer's payroll statement shall include all of the following
22 information:

23 1. The butterfat content of milk received from the producer
24 during the pay period, expressed as a percentage by weight of milk
25 received.

26 2. The total pounds of butterfat in the milk received from

1 the producer during the pay period.

2 3. The pay price per pound of butterfat.

3 4. The gross amount paid for butterfat, obtained by
4 multiplying the total pounds of butterfat under subd. 2. by the pay
5 price under subd. 3.

6 5. The pay price per hundredweight for butterfat, obtained by
7 dividing the gross amount paid for butterfat under subd. 4.*by the
8 milk volume in hundredweights under sub. (4).

9 6. Price adjustments per hundredweight for other milk
10 components such as protein or solids not fat.

11 7. Price adjustments per hundredweight for milk grade or
12 quality, including adjustments for bacteria or somatic cell counts.

13 8. Price adjustments per hundredweight based on volume or
14 other factors identified on the payroll statement.

15 9. The producer's average gross pay per hundredweight of
16 milk, obtained by applying the adjustments under subds. 6. to 8. to
17 the pay price per hundredweight for butterfat under subd. 5.

18 (b) Payment based on 3.5% butterfat differential. If the
19 dairy plant operator is paying the producer on a 3.5% butterfat
20 differential basis, the producer's payroll statement shall include
21 all of the following information:

22 1. The base price per hundredweight for milk containing 3.5%
23 butterfat by weight.

24 2. The price differential per hundredweight for each
25 percentage point, plus or minus, by which the butterfat content of
26 the producer's milk differs from 3.5%.

1 3. Price adjustments per hundredweight for other milk
2 components such as protein or solids not fat.

3 4. Price adjustments per hundredweight for milk grade or
4 quality, including adjustments for bacteria or somatic cell counts.

5 5. Price adjustments per hundredweight based on volume or
6 other factors identified in the producer's payroll statement.

7 6. The producer's average gross pay per hundredweight of milk
8 after adjustments under this subsection.

9 (c) Payment based on multiple component pricing. If the
10 dairy plant operator is paying the producer on a multiple component
11 pricing basis, the producer's payroll statement shall include all
12 of the following information:

13 1. The milk volume in hundredweights under sub. (4)
14 multiplied by the applicable producer price differential per
15 hundredweight.

16 NOTE: Federal milk marketing orders specify, for each pay
17 period, minimum producer price differentials for grade A milk
18 covered by those orders.

19 2. The pounds of butterfat contained in the milk received
20 from the producer during the pay period, multiplied by the
21 applicable butterfat price per pound.

22 NOTE: Federal milk marketing orders specify, for each pay
23 period, minimum butterfat prices for grade A milk covered by
24 those orders.

25 3. The pounds of protein contained in the milk received from
26 the producer during the pay period, multiplied by the applicable
27 protein price per pound.

28 NOTE: Federal milk marketing orders specify, for each pay
29 period, minimum protein prices for grade A milk covered by
30

1 those orders.
2

3 4. The pounds of other solids contained in the milk received
4 from the producer during the pay period, multiplied by the
5 applicable price per pound for other solids.

6 NOTE: Federal milk marketing orders specify, for each pay
7 period, minimum "other solids" prices for grade A milk covered
8 by those orders.
9

10 5. For each applicable price adjustment based on milk grade
11 or quality, the milk volume in hundredweights under sub. (4)
12 multiplied by the price adjustment per hundredweight. The
13 producer's payroll statement shall identify the basis for each
14 price adjustment under this subdivision.

15 NOTE: This includes price adjustments for bacteria count,
16 somatic cell count, or other measures of grade or quality.
17 Federal milk marketing orders specify, for each pay period,
18 minimum somatic cell adjustments for grade A milk covered by
19 those orders.
20

21 6. For each applicable price adjustment based on volume or
22 other factors, the milk volume in hundredweights under sub. (4)
23 multiplied by the price adjustment per hundredweight. The
24 producer's payroll statement shall identify the basis for each
25 price adjustment under this paragraph.

26 7. The producer's average gross pay per hundredweight of
27 milk, calculated as the sum of the values under subs. 1. to 6.,
28 divided by the milk volume in hundredweights under sub. (4).

29 (8) GROSS AMOUNT DUE. A producer's payroll statement shall
30 specify the gross amount due the producer for the pay period, prior
31 to any deductions under sub. (11).

32 (9) AVERAGE GROSS PAY PER HUNDREDWEIGHT LESS HAULING CHARGES.

1 A producer's payroll statement shall specify the producer's average
2 gross pay per hundredweight less hauling charges. This consists of
3 the gross amount due under sub. (8) less total hauling expenses
4 charged to the producer for the pay period under sub. (11)(a),
5 divided by the milk volume in hundredweights under sub. (4).

6 (10) NET AMOUNT DUE. A producer's payroll statement shall
7 specify the net amount due the producer for the pay period. This
8 consists of the gross amount due under sub. (8) less all deductions
9 under sub. (11).

10 (11) DEDUCTIONS. A producer's payroll statement shall
11 specify the nature and amount of every deduction from the gross
12 amount due the producer under sub. (8), including deductions for
13 any of the following which may apply:

- 14 (a) Milk hauling expenses charged to the producer.
- 15 (b) Deductions related to drug residue violations.
- 16 (c) Dairy products which the producer buys from the dairy
17 plant operator.
- 18 (d) Supplies which the dairy plant operator provides to the
19 producer.
- 20 (e) Wisconsin milk marketing board deductions.
- 21 (f) National dairy promotion deductions.
- 22 (g) Commodity credit corporation deductions.
- 23 (h) Insurance deductions.
- 24 (i) Cooperative fees or capital retained.
- 25 (j) Creditor assignments.
- 26 (k) Other deductions.

1 **SECTION 3.** ATCP 100.76(3m) is created to read:

2 ATCP 100.76(3m) Records showing the nature and amount of any
3 non-price consideration which the operator furnishes to a producer
4 in return for the producer's sale of milk to the operator, but
5 which is not reflected in that producer's payroll statements under
6 s. ATCP 100.75. In this subsection, "non-price consideration" has
7 the meaning given in s. ATCP 100.98(8).

8 **SECTION 4.** Subchapter VI of ch. ATCP 100 is created to read:

9 **SUBCHAPTER VI**

10 **DISCRIMINATORY PAYMENTS TO PRODUCERS**

11 **ATCP 100.98 DEFINITIONS.** In this subchapter:

12 (1) "Base period" means the dairy plant operator's most
13 recently completed fiscal year, or another representative period
14 approved by the department.

15 (2) "Base period producer service cost" means a dairy plant
16 operator's total cost, for the operator's base period, for all of
17 the following:

18 (a) Dairy farm field service costs other than field service
19 costs which are directly attributable to violations of ch. ATCP 60.

20 (b) Costs to test dairy farm milk shipments before the dairy
21 plant operator commingles those milk shipments with other milk
22 shipments at the dairy plant. Testing costs include lab testing,
23 reporting and recordkeeping costs related to milk testing. Testing
24 costs do not include costs incurred by a milk hauler to collect
25 milk samples from dairy farms, nor do they include costs incurred
26 because of producer's violation of ch. ATCP 60.

1 (c) Expenses to prepare and maintain producer payroll records
2 and process payments to producers.

3 (d) Dairy farm license fees and other routine expenses which
4 the dairy plant operator incurs in connection with the licensing
5 and regulation of dairy farms.

6 (e) Other costs which the department allows in writing.

7 (3) "Base period pickup cost" means a dairy plant operator's
8 total cost, for the operator's base period, to collect milk from
9 dairy farms. "Base period pickup cost" does not include any of the
10 following:

11 (a) Milk collection and hauling costs which the dairy plant
12 operator charges to milk producers.

13 (b) Transportation or milk hauling costs incurred before the
14 milk hauler arrives at the first dairy farm on the hauling route,
15 or after the milk hauler leaves the last farm on the hauling route.

16 (4) "Milk price" means a producer's average gross pay per
17 hundredweight less hauling charges, calculated for a pay period
18 according to s. ATCP 100.75(9).

19 (5) "Pay class" means a group of producers who qualify for
20 the same volume premium.

21 (6) "Pickup cost per hundredweight" means the cost calculated
22 under s. ATCP 100.983(5) for a pay class or individual producer.

23 (7) "Producer service cost per hundredweight" means the cost
24 calculated under s. ATCP 100.983(4) for a pay class or individual
25 producer.

26 (8) "Non-price consideration" means anything of monetary

1 value which a dairy plant operator or the operator's agent offers
2 or provides to a producer in return for the producer's sale of milk
3 to the operator, but which is not reflected in the milk price.
4 "Non-price consideration" includes monetary payments, goods, milk
5 hauling services, farm and household services, prizes, price and
6 financing considerations, and other things that have direct
7 monetary value to the producer. "Non-price consideration" includes
8 services which a milk hauler furnishes as an agent of a dairy plant
9 operator.

10 (9) "Volume premium" means any form of milk price increment
11 or non-price consideration which a dairy plant operator or the
12 operator's agent offers or provides to a producer based on the
13 producer's milk volume, or which the operator or agent offers or
14 provides only to certain producers based on their milk volume.

15 NOTE: If a dairy plant operator pays a producer a higher
16 price per hundredweight based on the total weight of any milk
17 component (e.g., protein or butterfat) received from that
18 producer, that price increment is a "volume premium" as
19 defined under sub. (9). However, a per-hundredweight price
20 increment based solely on the percentage contents of milk
21 components in milk is not a "volume premium."
22

23 ATCP 100.981 PRICE DISCRIMINATION PROHIBITED. Except as
24 provided under s. ATCP 100.982, 100.983 or 100.984, no dairy plant
25 operator may do any of the following if the operator's action
26 injures any producer or injures, destroys or prevents competition
27 between competing dairy plant operators:

28 (1) Discriminate between producers, directly or indirectly,
29 in the milk price offered or paid to those producers.

30 (2) Discriminate between producers, directly or indirectly,

1 in the value of any non-price consideration offered or provided to
2 those producers. A dairy plant operator does not discriminate
3 under this subsection if the operator offers the same non-price
4 consideration to all producers on equal terms, so that the same
5 non-price consideration is effectively available to all producers
6 who wish to receive it.

7 NOTE: Section ATCP 100.981 is adopted under s. 100.20(2),
8 Stats., and other applicable statutes. A person who suffers
9 a monetary loss because of a violation of s. ATCP 100.981 may
10 therefore bring a private lawsuit against the violator under
11 s. 100.20(5), Stats., and may recover double damages, costs
12 and reasonable attorney fees.
13

14 ATCP 100.982 EXEMPTIONS. Section ATCP 100.981 does not
15 prohibit a dairy plant operator from doing any of the following:

16 (1) Paying a different milk price for grade A versus grade B
17 milk.

18 (2) Complying with a federal milk marketing order.

19 (3) Properly charging a producer, pursuant to ch. ATCP 60 or
20 the procurement contract, for costs which the dairy plant operator
21 incurs because of the producer's violation of ch. ATCP 60.

22 (4) Paying different milk prices to producers based on actual
23 differences in the quality of their milk, or based on actual
24 differences in the percentage content of milk components in their
25 milk, provided that all of the following apply:

26 (a) The dairy plant operator pays for milk quality, or for
27 the percentage content of milk components in a producer's milk,
28 according to a written payment schedule which the operator
29 announces and makes available on equal terms to all producers from
30 whom the dairy plant operator buys milk.

1 (b) The payment schedule under par. (a) clearly indicates the
2 amounts by which payments will vary based on actual differences in
3 milk quality, or based on actual differences in the percentage
4 content of milk components in a producer's milk.

5 (c) The dairy plant operator measures the differences under
6 par. (b) using accepted scientific methods.

7 (d) The payment schedule under par. (a) does not discriminate
8 between producers having the same milk quality, or the same
9 percentage content of milk components in their milk.

10 (e) Milk quality and milk component payments are not based on
11 milk volume or restricted to certain producers based on volume.

12 (f) The dairy plant operator complies with ss. ATCP 80.26(2)
13 and 100.75.

14 **ATCP 100.983 COST-JUSTIFICATION DEFENSE.** (1) GENERAL. In
15 any proceeding against a dairy plant operator, in which the
16 operator is alleged to have discriminated between pay classes or
17 individual producers in violation of s. 100.981, it is a defense
18 for the operator to prove, based on documentary evidence which the
19 operator possessed and relied upon at the time of the alleged
20 discrimination, that the amount of the price discrimination per
21 hundredweight between those pay classes or individual producers did
22 not exceed, in any relevant pay period, the difference in the
23 operator's relevant procurement cost per hundredweight between
24 those pay classes or producers.

25 (2) VOLUME PREMIUMS BASED ON TOTAL MILK VOLUME. A dairy
26 plant operator shall use the following relevant procurement costs

1 per hundredweight to justify, under sub. (1), discrimination
2 resulting from the payment of volume premiums based on total milk
3 volume:

4 (a) Pay class. The operator's relevant procurement cost per
5 hundredweight for each pay class is the operator's "producer
6 service cost per hundredweight" for that pay class, calculated
7 according to sub. (4)(a).

8 (b) Individual producer. The operator's relevant procurement
9 cost per hundredweight for each individual producer is the
10 operator's "producer service cost per hundredweight" for that
11 individual producer, calculated according to sub. (4)(b).

12 (3) VOLUME PREMIUMS BASED ON VOLUME PER PICKUP. A dairy
13 plant operator shall use the following relevant procurement costs
14 per hundredweight to justify, under sub. (1), discrimination
15 resulting from the payment of volume premiums based on volume per
16 pickup:

17 (a) Pay class. The operator's relevant procurement cost per
18 hundredweight for a pay class is the sum of the operator's
19 "producer service cost per hundredweight" under sub. (4)(a) and
20 "pickup cost per hundredweight" under sub. (5)(a), except that the
21 operator may not include "producer service cost per hundredweight"
22 if the operator also pays volume premiums based on total volume.

23 (b) Individual producer. The operator's relevant procurement
24 cost per hundredweight for an individual producer is the sum of the
25 operator's "producer service cost per hundredweight" under sub.
26 (4)(b) and "pickup cost per hundredweight" under sub. (5)(b),

1 except that the operator may not include "producer service cost per
2 hundredweight" if the operator also pays volume premiums based on
3 milk volume.

4 NOTE: If a dairy plant operator pays separate volume
5 premiums based on total milk volume and volume per pickup, the
6 operator must separately justify the total volume premiums
7 under sub. (2) and the per-pickup volume premiums under sub.
8 (3).

9 (4) PRODUCER SERVICE COST PER HUNDREDWEIGHT. (a) For a pay
10 class. To calculate a dairy plant operator's "producer service
11 cost per hundredweight" for a pay class in any pay period:

12 1. Determine the operator's base period producer service
13 cost, as defined in s. ATCP 100.98(2). Divide that cost by the
14 average number of producers who shipped milk to the operator during
15 the base period.

16 2. Multiply the result under subd. 1 by the number of
17 producers in the pay class during the relevant pay period.

18 3. Divide the result under subd. 2 by the hundredweights of
19 milk which the pay class produced during the relevant pay period.
20 This yields the operator's "producer service cost per
21 hundredweight" for that pay class in that pay period.

22 (b) For an individual producer. To calculate a dairy plant
23 operator's "producer service cost per hundredweight" for an
24 individual producer in any pay period:

25 1. Determine the operator's base period producer service
26 cost, as defined in s. ATCP 100.98(2). Divide that cost by the
27 average number of producers who shipped milk to the operator during
28 the base period.

1 2. Divide the result under subd. 1 by the number of
2 hundredweights of milk which the individual producer shipped to the
3 operator during the relevant pay period. This yields the
4 operator's "producer service cost per hundredweight" for that
5 individual producer in that pay period.

6 (5) PICKUP COST PER HUNDREDWEIGHT. (a) For a pay class. To
7 calculate a dairy plant operator's "pickup cost per hundredweight"
8 for a pay class in any pay period:

9 1. Determine the operator's base period pickup cost, as
10 defined in s. ATCP 100.98(3). Divide that cost by the total number
11 of farm stops made during the base period.

12 2. Multiply the result under subd. 1 by the number of stops
13 made, during the relevant pay period, at dairy farms operated by
14 producers in the pay class.

15 3. Divide the result under subd. 2 by the hundredweights of
16 milk collected, during the relevant pay period, from producers in
17 the pay class. This yields the operator's "pickup cost per
18 hundredweight" for that pay class in that pay period.

19 (b) For an individual producer. To calculate a dairy plant
20 operator's "pickup cost per hundredweight" for an individual
21 producer in any pay period:

22 1. Determine the operator's base period pickup cost, as
23 defined in s. ATCP 100.98(3). Divide that cost by the total number
24 of farm stops made during the base period.

25 2. Multiply the result under subd. 1 by the number of stops
26 made at the producer's dairy farm during the relevant pay period.

1 3. Divide the result under subd. 2 by the hundredweights of
2 milk collected from the producer's dairy farm during the relevant
3 pay period. This yields the operator's "pickup cost per
4 hundredweight" for that individual producer in that pay period.

5 (6) COST ACCOUNTING. (a) At the request of a dairy plant
6 operator, the department may approve alternative methods for
7 calculating relevant procurement costs per hundredweight under this
8 section. The department shall give its approval, if any, in
9 writing.

10 (b) Costs under this section shall be determined on the basis
11 of generally accepted accounting principles using the accrual
12 method of accounting.

13 (7) VALUE OF NON-PRICE CONSIDERATION PER HUNDREDWEIGHT. If
14 a dairy plant operator seeks to cost-justify a discrimination in
15 non-price consideration under s. ATCP 100.981(2), the operator
16 shall calculate the value of that non-price consideration per
17 hundredweight by dividing the value of the non-price consideration
18 provided in each pay period by the hundredweights of milk which the
19 recipient of that non-price consideration produced during that pay
20 period.

21 ATCP 100.984 MEETING COMPETITION DEFENSE. (1) GENERAL. In
22 any proceeding against a dairy plant operator, in which the
23 operator is alleged to have discriminated between producers or pay
24 classes in violation of s. ATCP 100.981, it is a defense for the
25 operator to prove that the operator discriminated between those
26 producers or pay classes in good faith in order to meet

1 competition.

2 (2) PROOF REQUIRED. No dairy plant operator may claim the
3 meeting competition defense under sub. (1) unless the operator
4 proves all of the following, based on documentary evidence which
5 the operator possessed and relied upon when the operator engaged in
6 the alleged discrimination:

7 (a) The operator offered the discriminatory milk price or
8 non-price consideration in response to a competitor's prior offer
9 to producers in the operator's procurement area.

10 (b) The competitor's prior offer under par. (a) was still in
11 effect when the operator offered the discriminatory milk price or
12 non-price consideration.

13 (c) The operator's discriminatory milk price or non-price
14 consideration was similar in kind to the competitor's prior offer
15 under par. (a), and did not exceed the competitor's offer.

16 (d) The operator offered the discriminatory milk price or
17 non-price consideration only in that part of the operator's
18 procurement area which overlapped the competitor's procurement
19 area, or only to those producers who received the competitor's
20 prior offer under par. (a).

21 (3) LIMITATIONS. No dairy plant operator may claim the
22 meeting competition defense under sub. (1) for either of the
23 following:

24 (a) A milk volume premium which exceeds, for producers
25 shipping equivalent volumes of milk, the milk volume premium
26 offered or paid by the competitor whose competition the operator is

1 purporting to meet.

2 (b) Discrimination which occurred more than 30 days after the
3 last day on which the competitor's offer was in effect.

4 ATCP 100.985 DEMANDING JUSTIFICATION. (1) The department
5 may, by written notice, require a dairy plant operator to file with
6 the department the documentation which that operator relies upon to
7 justify, under s. ATCP 100.982, 100.983 or 100.984, a payment or
8 offer which appears to discriminate between producers or pay
9 classes in violation of s. ATCP 100.981.

10 (2) A dairy plant operator shall file documentation in
11 response to the department's demand under sub. (1) within 14 days
12 after the operator receives that demand, or by a later date which
13 the department specifies in its demand. The department may extend
14 the filing deadline for good cause shown.

15 NOTE: See ss. 93.15 and 93.21(4), Stats.

16 ATCP 100.986 FAILURE TO JUSTIFY DISCRIMINATION; NOTICE. (1)
17 DEPARTMENT NOTICE TO ALLEGED VIOLATOR. If the department finds
18 that a dairy plant operator's documentation under s. ATCP 100.985
19 fails to justify a discrimination in milk price or non-price
20 consideration, the department may give the dairy plant operator
21 written notice of that finding.

22 (2) PUBLIC INSPECTION. A notice under sub. (1) is open to
23 public inspection under subch. II of ch. 19, Stats.

24 (3) NOT A PREREQUISITE FOR ENFORCEMENT. A notice under sub.
25 (1) is not a prerequisite for an action to enforce this chapter or
26 s. 100.22, Stats., nor is it a prerequisite for a private action

1 under s. 100.20(5), Stats.

2 (4) NOTICE DOES NOT PROVE VIOLATION. A notice under sub. (1)
3 does not prove that a dairy plant operator violated this chapter or
4 s. 100.22, Stats.

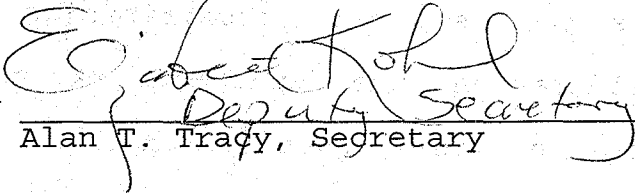
5 **ATCP 100.987 INJURY TO PRODUCER.** In a proceeding against a
6 dairy plant operator under s. 93.06(7) or (8), 100.20(5) or (6),
7 100.22(4) or (5), or 100.26(3) or (6), Stats., proof that a
8 complaining producer received a lower milk price or non-price
9 consideration than another producer shipping milk to the same dairy
10 plant during the same pay period is presumptive evidence of injury
11 to that producer.

12 **EFFECTIVE DATE.** The rules contained in this rulemaking order
13 shall take effect on the first day of the month following
14 publication in the Wisconsin administrative register, as provided
15 under s. 227.22(2)(intro.), Stats.

16
17 Dated this 9th day of August, 1996.

18 STATE OF WISCONSIN
19 DEPARTMENT OF AGRICULTURE,
20 TRADE AND CONSUMER PROTECTION

21
22
23
24 By


25 Alan T. Tracy, Secretary
26
27