

OPINION
66-1

September 14, 1966 (OPINION)

Mr. John K. Schick

Acting Dairy Commissioner

RE: Agriculture - Dairy Products - Unfair Discrimination

This is in reply to your letter of August 31, 1966, requesting an opinion of this office in regard to the sale of farm milk and finished pasteurized milk and milk products.

You give for an example the situation in one city. In that city the "set price" per half gallon of milk in approximately five stores in the same city is 49 cents. One store, privately owned and with no outlets in other cities, cuts this price to 44 cents. You ask whether this cutting of the price would be considered discrimination on the part of the store owner who cut the price. You also ask whether he could be denied the privilege of purchasing milk from the creamery until such time as his price was the same as other outlets in the city.

You state further that his competitors have many outlets over the State and you ask whether these competitors can sell milk under the 44 cents price without violating the State discrimination laws.

The basic State discrimination statute is section 4-14-04 of the 1965 Supplement to the North Dakota Century Code, which provides as follows:

"UNFAIR DISCRIMINATION IN SALE OF FARM PRODUCTS. - Any person doing business in the state of North Dakota and engaged in the manufacture, distribution, or sale of farm products who discriminates between different sections, communities, cities, or villages, or portions thereof in this state, by selling at a lower price or rate in one section, community, city, or village, or portion thereof than is charged by such person for such farm products in another section, community, city, or village, or portion thereof, after making due allowance for the difference, if any, in the actual cost of transportation of such products, is guilty of unfair discrimination. Proof of such differential in price shall be prima facie evidence of violation of this section in a civil action. It shall not be unfair discrimination for any person to sell in any section, locality, community, city, or village at a price equal to that actually charged on the same day by any bona fide competitor in such section or locality for farm products of the same kind and grade if such price is charged in a bona fide and good faith effort to meet competition, and in such case, the burden of proving such facts shall be upon the defendant in a civil action."

In reply to your first question, assuming the individual, one outlet store, privately owned, sells to all customers at the 44 cents price,

we do not believe there would be a violation of this statute. In reply to your last question, assuming these competitors with several outlets sell at the 44 cents price or lower uniform price at all their outlets, there would be no violation of this statute. On the other hand, if these competitors sold at a higher price at other outlets and below the 44 cents price at their outlet competing with the single outlet store described, there would be a violation. The statute permits competitors with several outlets to "sell in any section, locality, community, city, or village at a price equal to that actually charged on the same day by any bona fide competitor in such section or locality for farm products of the same kind and grade * * * ." (Emphasis supplied.)

The state statutes do not give a definite answer to the question of whether the individual, one outlet store now maintaining the 44 cents price, could be denied the privilege of purchasing milk from the creamery until such time as his price was the same as other outlets in the city. Dairy and cream station licenses are provided for by section 4-18-02 of the North Dakota Century Code. Dairy and cream stations are statutorily defined by section 4-18-01 of the North Dakota Century Code, in part, as places where milk or cream from more than one herd is received. No specific provision is made as to any requirement that they receive or sell milk to all offerors. The statutory definition of "dairy" does include a provision as to sale to the general public, although we do not find a statutory requirement that sales must necessarily be made to all members of the general public.

On such basis we do not find that the State Dairy Department is in a position to either require, forbid, or make recommendations as to whether the individual, one outlet store mentioned, could be denied the privilege of purchasing milk from the creamery until such time as his price is the same as other outlets in the city. We have not considered herein the possibilities of sales below cost, price fixing or restraint of trade.

HELGI JOHANNESON

Attorney General