

**OPINION
70-9**

March 30, 1970 (OPINION)

Mr. Leland R. Miller
Dairy Commissioner
Department of Agriculture

RE: Agriculture - Dairy Processors - Surety Bonds

This is in response to your letter of March 17, 1970, wherein you make a request for an opinion of this office regarding amounts reported by milk and dairy processors as determining the amount of surety bond or certified bank draft referred to in section 4-30-03 of the North Dakota Century Code, as amended. You submit the following facts and observations in your letter of inquiry:

"An opinion is requested relative to deductions made by dairy plants from producer's payments for hauling expenses, and butter, cheese and other materials or products purchases:

"Section 4-30-03 of the North Dakota Century Code requires that:

'Each applicant for license under section 4-30-02, who purchases milk or cream from a dairy producer, shall file with his application for license a surety bond or certified bank draft held in favor of the dairy department. The amount of such surety bond or certified bank draft shall be determined on the basis of average purchases of milk or cream from dairy producers during the previous year,....'

"This Department has determined the amount of the bond on the full amount of the products purchased from the producers by the plants.

"Some producers purchase cheese, butter and other products from the plants on a monthly basis. In some instances, these purchases have been deducted from the producer's milk or cream payment made by the plant, as is the cost of hauling.

"Your opinion is requested as to whether it is permissible for these plants, in making their required report to this Department of their purchases of milk and milk products from producers, to exclude the above specified deductions. These reports are the basis for our determination of the amount of bond required under the above statute.

"For example: Farmer Brown is paid \$40.00 for his milk from the plant; however, the plant charges \$10.00 for hauling and Farmer Brown purchases \$20.00 worth of butter, cheese, etc., the plant then would show a net purchase of \$10.00 in dairy products on the report furnished this Department rather than the original \$40.00.

"We attach a copy of 'Semiannual Report of Dairy Products' above referred to."

You have also enclosed a form which is to be used by the processor in reporting production pursuant to the provisions of section 4-30-46 of the North Dakota Century Code, as amended.

We would first note that the reporting form which you furnished us for examination and which your letter informs us supplies your department with information upon which you make your determination as to the required amount of bond appears to contemplate a semiannual report of dairy products. We are unable to ascertain from such form where information relative to whether payment for dairy produce is made on a weekly, monthly, semiannual or annual basis, while we note that section 4-30-03 calls for a surety bond or

certified bank draft on the basis of average amounts purchased within a particular payment period, i.e., weekly, semimonthly, monthly, etc. It would therefore appear and we are compelled to presume that other factors and information are necessary in making a determination as to the amount of bond or draft required by section 4-30-03.

With regard to the amount of bond or other security required by said section 4-30-03, we would first note the intent of the statute insofar as limits of protection are concerned. Section 4-30-03 provides in part:

"* * * The commissioner shall be named as obligee, but the bond or draft shall be held for the purpose of protecting, and for the benefit of, any dairy producer and the full and complete payment to the seller for all milk or cream purchased by the licensee; * * *."
(emphasis supplied)

Accordingly, we would note that the intent of the statute and the protection afforded thereby is for the benefit of the dairy producer. We would also need to note that the statute in question, section 4-30-03, heretofore set forth, which provides for and establishes the formula for determining the amount of such surety bond or certified bank draft indicates that such indemnity "shall be determined on the basis of average purchases of milk or cream from dairy producers."

While an argument may exist that the statute refers to net purchases, based on a delivered price, we fail to see that such exception is contemplated by the statute. Quite obviously the transportation of such products from the producer to the processor is an expense which is borne by the producer. The amount which the processor may charge the various producers at varying distances and pickup points does not change the purchase price of such dairy products. It appears that such transportation costs are borne by the producer whether the transportation of such products is effected by the processor, the producer himself, or an independent contractor. It would appear that the sum total delivered price of such products to the processor is the purchase price whether deductions are made or not. It certainly cannot be said that a producer living twenty-five miles from the processing plant is paid less or receives less for his product than one who lives only a fraction of a mile from the processing plant in spite of the fact that the producer living at a greater distance may have more expense involved in delivering his product. On this basis, we can only come to the conclusion that the purchases of such products as referred to in the statute can only mean the actual amount of credit which the processor must extend for such products are valued on a dollars and cents basis. The intent of the hauling or other expenses of production and delivery would appear immaterial. Therefore, in direct reply to your inquiry, we are of the opinion that the "average purchases of milk or cream from dairy producers" as set forth in the statute anticipates the full purchase price and does not provide for deductions for hauling expense which may or may not be paid for by the processor, depending upon who is effecting such transportation.

With regard to deductions for purchases by the producer from the processor for such items such as milk, butter, cheese and other dairy products, it would appear that a somewhat different situation exists. In the instance of the deductions for hauling expenses, it would appear that such costs are an actual expense against the delivered price of the products being produced and that such expenses are borne by the producer and have no bearing on the purchase price of such products. In the instance of deductions for purchases by the producer, however, it appears that the benefit or consideration for the products is payable to the producer, the party which the statute directly purports to indemnify by the bond requirement. It would appear immaterial whether the payment is made on a monetary basis or in manufactured products, so long as the same is credited to the producer as payment for dairy products produced by him. Apparently the credits earned by the producer for his dairy products as well as his purchases of processor's products are valued on a dollar and cents basis. The intent of the statute in questions is to assure payment to the producer for products sold to the processor. The nature of such payment would appear immaterial insofar as the assurance afforded by the statute is concerned.

In direct reply to your inquiry, it is our opinion that the deduction of hauling expenses from the average purchases from the producer, whether on a weekly, semimonthly, or other basis, would not be a proper deduction from such purchase amounts when considering the amount of surety bond or certified bank draft

required by section 4-30-03 of the North Dakota Century Code, as amended. With regard to purchases made by the producers of such items as milk, butter, cheese and other products, it is our opinion that the amounts such purchases are not proper deductions from the purchases made by the processor and that such amounts should be included in the average purchases by the processor in determining the amount of surety bond or certified bank draft required by section 4-30-03 of the North Dakota Century Code, as amended.

HELGI JOHANNESON
Attorney General