

support or oppose the issuance of the credit for Class I milk purchased during months of very short production.

Gold Star contended that there is no record evidence to support DCMA'S argument that supplemental milk would be needed beyond October. According to Gold Star's brief, the last year of shipments into the southeast region from Wisconsin was in 1992, a year in which shipments began in mid-August and extended to October. The brief also argued that shipments from Wisconsin in 1995 probably have peaked already and that no shipments will likely be needed after October.

Gold Star and Southern Belle argued that the Secretary does not have the authority to issue rules that would have a retroactive effect. Moreover, even if he did, they contend, such authority would invite the post-crisis demand for modifications of the rules to alleviate problems that may no longer exist.

A brief filed on behalf of Land-O-Sun Dairies, Inc. (Land-O-Sun), opposed the proposed transportation credit. Land-O-Sun stated that it operates pool plants regulated under Orders 5 and 11 in Spartanburg, South Carolina, and Kingsport, Tennessee, respectively. The handler also indicated it operates an Order 5 partially regulated plant in Portsmouth, Virginia.

Land-O-Sun argued that the Secretary lacks the authority to grant rules regarding transportation credits that would have a retroactive effect absent the expressed statutory language. According to Land-O-Sun, the Department of Health and Human Services (HHS) issued a rule in 1984 which applied to a cost reimbursement calculation method and tried to recoup costs that were incurred prior to the effective date of the 1984 rule. However, Land-O-Sun noted, in the case of *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Supreme Court invalidated the retroactive feature of the HHS rule.

Land-O-Sun contends that the Agricultural Marketing Agreement Act, as amended, is wholly silent on the issue of retroactive powers vested in the Secretary. It argues that in 1986 the

Secretary did not have the authority to implement retroactively the Class I differentials mandated by the 1985 Farm Bill and, by the same token, does not now have the authority to implement the proposed transportation credits retroactively.

Land-O-Sun argues that even if the Secretary had the authority to impose the retroactive transportation credits, he should deny this request because the problem should have been addressed through private business agreements. The Land-O-Sun brief states that the proposed credit penalizes both handlers who procured their own supplies and producers not involved in bringing in supplemental supplies. Finally, Land-O-Sun stated that there is significant competition between Order 5 plants and plants located in Florida, Georgia, Tennessee, Virginia, and Kentucky and that the 5-cent higher surcharge for Order 5 compared to Orders 7 and 11 would place Order 5 handlers at a competitive disadvantage.

Milkco, Inc. (Milkco), a fully regulated handler under Order 5, filed a post-hearing brief in opposition to the proposed transportation credit because of its retroactive effect. Milkco stated that if a transportation credit is granted, it should apply to the same months that an emergency fluid milk surcharge would be applicable.

After carefully evaluating the record evidence and the post-hearing briefs, we must conclude that during the summer of 1995 there was a need for supplemental milk for Class I use in all of the 6 orders and that this need was particularly acute for the Carolina and 3 Florida orders. Furthermore, the record clearly shows that the burden of bringing in supplemental milk to satisfy fluid milk demand fell, almost exclusively, on the cooperative associations supplying these markets. The record also shows that during the months of July and August 1995 over-order charges were either non-existent or—where they did exist—appeared to be inadequate to compensate the cooperatives for the costs which they incurred.

It may be true, as opponents argue, that price adjustments should not be made to compensate for prior marketing costs. Any pool plant operator that obtained milk on a direct-shipped basis—at whatever cost it had to pay—during July through September of 1995 would not be eligible for a credit under the DCMA proposal; yet the handler would now be asked to pay a higher Class I price to subsidize someone else's supplemental milk expense.

Opponents argued that the Secretary lacks the authority to retroactively apply the proposals. Ultimately, this question can only be clarified in a court of law. However, in this proceeding the threshold question of whether or not the proposals are supported by the record precludes any subsequent debate concerning their legality.

While the record clearly showed that a great deal of milk was brought into the 6 markets, it lacked comparable data for earlier years from which to measure the magnitude of this year's problem. As can be seen in Table 1, for example, there was clearly much more bulk milk imported to the Carolina and Florida markets for Class I use in August of 1995 compared to August 1993, but this picture is less clear in comparing the bulk imports for the Southeast market in August 1995 compared to August 1994, and the comparison is virtually impossible for the Tennessee Valley market because of the restrictions on the data. Also, while the record data unequivocally demonstrated a significant drop in production for some of the markets involved in this proceeding, it was less demonstrative for some of the other markets involved. For example, while producer receipts in the Southeastern Florida market were down by 8.5 percent in July (compared to July 1994), they were up by 19 percent during July 1995 in the Tennessee Valley market. Similarly, in August 1995 producer receipts were down (compared to a year earlier) in 4 of the 6 markets, but they were up by 4 percent in Order 7 and by 2 percent in Order 11.

TABLE 1.—MILLIONS OF POUNDS OF BULK FLUID MILK PRODUCTS FROM OTHER ORDER PLANTS

[Not Requested for Class II or III Use, July–August, 1993–1995]

	7/93	8/93	7/94	8/94	7/95	8/95
Order 5	2.3	1.8	R	R	1.7	12.3
Orders 6, 12, and 13	2.4	17.3	R	15.8	16.3	32.9
Order 7	4.1	12.3	6.9	27.6	10.5	29.7
Order 118	R	0	R	R	5.2

R = Data restricted. Less than 3 handlers involved.