

agricultural business of the employer, administrative officers should not by devious or arbitrary construction attempt to override its intent.

Whether the activities of an employee in any particular case are to be considered agricultural or commercial or industrial, must depend on the facts of the particular case and no definite rule of general application can be evolved.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: GRACE J. FORD,
Assistant Deputy Attorney General.

JUNE 10, 1949.

DANIEL BERGSMA, M.D., M. P. H.,
State Commissioner of Health,
State Department of Health,
State House,
Trenton, New Jersey.

Attention: L. M. LOUNSBERY, *Veterinarian in Charge, Food & Drug Section.*

FORMAL OPINION—1949. No. 65.

DEAR SIR:

This is in response to your communication dated May 24, 1949, concerning a milk product labeled "Frozen Milk Drink."

It appears from your communication that sugar and flavoring are mixed with a high test milk, the mixture agitated, then partially frozen in an ice cream freezer and subsequently placed in a "hardening" room to complete the freezing process. The finished product is transported in refrigerated trucks to the company's retail outlets, placed in a storage box and scooped from the container as needed. The product is labeled "Frozen Milk Drink—For Milk Shakes Only" and is supposedly used only in making milk shakes.

Analysis discloses that it contains less than ten per cent butterfat and more than five per cent total milk solids. On examination, the product has the texture and characteristics of ice cream. Three questions arise and their answers follow:

Question 1: Is the product an imitation ice cream where it is not sold in the frozen state as ice cream (R. S. 24:10-63)?

Answer: No.

Question 2: Does R. S. 24:10-65 apply?

Answer: No.

Question 3: Can R. S. 24:10-66 be applied independently of the above sections?

Answer: No.

For the sake of clarification, an explanation of the answers is needed. The provisions of R. S. 24:10-58 to 73 were taken from Chapter 271, P. L. 1907 (An act to secure the purity of foods, beverages, confectionery, condiments, drugs and medicines, and to prevent deception in the distribution and sales thereof). Chapter 271, P. L. 1933, was amended by Chapter 437, P. L. 1933. These statutes regulate the manufacture, production, distribution and sale of ice cream and similar frozen food products.

R. S. 24:10-58 (in the first paragraph) defines ice cream as any frozen, sweetened, milk product, which is agitated during the process of freezing and includes every frozen milk product which contains more than five per cent by weight of total milk solids and which, in any manner, simulates the texture and characteristics of ice cream. The product in question comes within the terms of this definition. However, the second paragraph of this section then sets up the standards of ice cream and requires the finished product to contain not less than ten per cent butterfat by weight, with some exceptions, not applicable here. The product in question does not conform to the standards required as it is deficient in the amount of butterfat. The product also is not a sherbet within the definition contained in R. S. 24:10-60 as it contains more than five per cent by weight of total milk solids.

R. S. 24:10-63 defines imitation ice cream and ice cream substitute as any frozen, sweetened product containing milk solids, manufactured in a manner similar to the process of manufacturing ice cream, and which contains less than the percentage of butterfat required for ice cream and more than five per cent of total milk solids. When this definition is applicable, the product in question comes within it and would be classed as imitation ice cream or ice cream substitute, or both.

R. S. 24:10-65 prohibits the sale of ice cream which is adulterated. Ice cream is adulterated (R. S. 24:10-66) if it is an imitation ice cream or ice cream substitute, or if it falls below the standards fixed under this provision. The product in question, if sold as ice cream, would be considered adulterated under this section, and its sale, therefore, prohibited. However, the product in question is not sold as ice cream and should not be considered adulterated if not sold as the article of which it is purported to be an adulteration.

The latter part of R. S. 24:10-65 prohibits the sale of any imitation ice cream or ice cream substitute as defined in R. S. 24:10-63. This product comes within the terms of that definition and if R. S. 24:10-65 is strictly and literally applied, it would prohibit the sale of this product entirely. Such an absolute prohibition of sale which has no relation to health aspects, where the product is wholesome and in no way deleterious to health, in my opinion is too strict, too literal, and not a reasonable construction. It is my opinion that the prohibition of sale of imitation ice cream or ice cream substitute applies when it is sold as the article of which it is an imitation or a substitute, but it is not prohibited if not sold as the article of which it is an imitation, a substitute, or an adulteration.

I am forced to conclude that the sale of "Frozen Milk Drink" does not violate the act unless sold as, or for, ice cream or substituted for it. The method of sale would be the determinative factor. If it is sold in milk shakes as ice cream, or substituted in its place therein, this would constitute a violation, but if not so sold or substituted, I do not think that the sale of this product is absolutely prohibited.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH A. MURPHY,
Assistant Deputy Attorney General.

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