

facturer and are, so far as appears, made available to the public through many or all retailers which trade in the manufacturer's cigarettes indicates that there is no violation of the spirit of the Act since such practices do not injure competitors or destroy or substantially lessen competition at the retail or wholesale level.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHRISTIAN BOLLERMANN
Deputy Attorney General

NOVEMBER 7, 1957

HON. FLOYD R. HOFFMAN, *Director*
Office of Milk Industry
1 West State Street
Trenton, New Jersey

FORMAL OPINION, 1957—No. 23

DEAR DIRECTOR :

We have been asked whether the Office of Milk Industry has power to fix consumer resale prices in Area I. The question presented is answered in the affirmative.

Area I includes the northern twelve counties of the State and part of a thirteenth. Regulations H-2, H-7. The New York-New Jersey Milk Marketing Administrator has authority to fix monthly minimum prices payable by handlers to producers for milk consumed in this area (and for certain other milk not relevant to the present inquiry) whether produced in this State or another. 7 U.S.C.A. §§ 601 to 659 (1952); Order 27, 22 Fed. Reg. 4643, amending 7 C.F.R. § 927.3. The Administrator has adopted a complex formula for redetermining the prices monthly. Order 27, *supra*, §§ 927.40 to 927.45. These prices may vary widely, even from month to month. For example, from July to August of this year the basic price per hundredweight rose from \$4.09 to \$4.68, and in September, to \$5.03.

The Director has authority to fix "the prices at which milk is to be * * * sold" as part of his power to "regulate * * * the entire milk industry of the State of New Jersey." N.J.S.A. 4:12A-21. He also has authority to fix "the minimum prices to be charged the consumer for milk in the several municipalities or markets of this State * * *". N.J.S.A. 4:12A-22. The legislature has enacted a declaration of its intention to subject milk to regulation by New Jersey at the earliest moment when it can be so regulated, consistent with the commerce clause of the federal constitution. N.J.S.A. 4:12A-49. The Supreme Court of the United States has held that a state may regulate a phase of the milk industry where it is acting to protect an important domestic interest by means which do not discriminate against interstate commerce, although having a substantial effect on such commerce. This was the *ratio decidendi* of *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939), in which it was held that Pennsylvania could require licenses and bonds of dealers and regulate the prices they paid Pennsylvania producers even though the milk was resold out of state. On this principle, New Jersey may fix consumer prices in Area I in any manner which does not discriminate against interstate commerce. (There is no preemption problem here as the market administrator has no power to fix consumer prices). *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 615 (1937).

If the director does fix consumer resale prices, he must take into consideration a reasonable return to dealers, processors and subdealers. N.J.S.A. 4:12A-22. If the director did not reset prices monthly, the handlers' return might diminish upon an Order 27 price increase, possibly below a reasonable minimum. If the Order 27 price dropped, the return to handlers would tend to become excessive at the expense of the statutory purpose of providing maximum assurance of an adequate supply of wholesome milk to consumers. L. 1941, c. 274, Preamble. Therefore, monthly adjustments of any fixed minimum consumer resale prices are necessary in the area where Order 27 determines the price the handler pays.

But if the course of adopting specific prices for one month terms were adopted, serious practical disadvantages would result. No Office of Milk Industry order is effective until fifteen days after filing with the Secretary of State. N.J.S.A. 4:12A-23. Recurrent hearings would unduly burden both the Office of Milk Industry staff and the representatives of the various groups in the milk industry who find it necessary to appear at price fixing hearings. Where the cost of processing and distribution remains substantially constant but the wholesale price fluctuates, as under Order 27, we suggest that the most effective way for determining consumer prices is to fix an increment to the Order 27 price. The Legislature anticipated this exigency by giving the director power to fix prices "under varying conditions". N.J.S.A. 4:12A-22.

If the Office of Milk Industry exercises the power to fix consumer prices in terms of an increment to Order 27 handler prices, it must be done after a hearing at which evidence of the appropriate increment or "spread" is presented. N.J.S.A. 4:12A-23.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

NOVEMBER 7, 1957

HONORABLE JOSEPH E. McLEAN
Commissioner of Conservation and Economic Development
State House Annex
Trenton, New Jersey

FORMAL OPINION, 1957—No. 24

Re: New York City Release Flows in the Delaware River

DEAR COMMISSIONER:

You have requested our opinion as to the obligation of New York City to maintain release flows in the Delaware River pursuant to the 1954 decree of the United States Supreme Court in the case of *New Jersey v. New York*, 347 U.S. 995 (1954). The inquiry also involves the authority of the River Master to permit the City to reduce the amount of water released where the circumstances might appear to warrant such reduction.

The decree enjoins the State and City of New York from diverting water from the Delaware River "except to the extent herein authorized and upon the terms