

MISSOURI DAIRY LAW: Creamery may refuse to buy cream from any producer so long as it does so on its own initiative and does not combine with others to refuse to buy milk products.

February 2, 1940

Honorable Jewell Mayes, Commissioner
State Department of Agriculture
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of January 15, 1940, which is as follows:

"Please consider this a request for an opinion on Section 28-a in relation to Section 24 of the new Missouri State Dairy Law that went into effect on November 1, 1939.

For simplification of wording, I am starting this request by identifying three terms as M, A and C, as follows:

"M" is a milk producer.
"A" is a cream station.
"C" is a creamery.

A and M offer to sell first grade cream at C, at the regular price then being paid to other sellers of first grade cream.

C refuses to buy said cream from M, because he does not know under what conditions said cream is produced as required in Section 24 of the 1939 Missouri Dairy Law.

Violation of Section 28a?

C refuses to buy said cream from A, because he does not know under what conditions said cream is stored,

produced, handled or transported as required by Section 24.

Is this a violation of Section 28a?
Is there a violation of Section 28a,
if C refuses to buy said cream with-
out giving any reason, and without
the party refusing having consulted
another creamery or creamery agent?

In order to violate Section 28a, does it not require the express or implied agreement of two or more to do the thing prohibited?"

Under the view we take, your two questions can be answered together. Section 28a of the new Missouri Dairy Law, found in Laws of Missouri, 1939, at pages 201 and 202, is as follows:

"It is hereby declared to be unlawful for any group of two or more expressly owned manufacturing plants or their agents to agree upon or fix prices of milk products, or to divide or assign any territory in the State of Missouri served by a cream buying station to any manufacturer licensed by this Act, or to assign or attempt to assign any cream buying station to any manufacturing plant, or to refuse to buy cream or milk offered for sale at the regular price then being paid by such manufacturing plant to other cream stations or sellers, or to agree not to purchase said cream or milk from said cream station or other seller, or to agree or attempt to agree that cream stations must, should or ought to sell their products to any particular manufacturer, and the violation of this provision shall constitute a felony, and upon conviction thereof shall be punished by imprison-

ment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment."

This statute is very similar to Sections 8702 and 8703 of the Revised Statutes of Missouri, 1929, commonly known as the Anti-Trust Statutes, and under which a number of decisions have been rendered by our courts. The substance of the two latter statutes, without setting them out in full, is a prohibition of all agreements, combinations, contracts or understandings made or entered into between any two or more persons made with a view to lessen lawful trade or full and free competition in the manufacture or sale of any products.

It appears that Section 28a, supra, defines six separate offenses, and makes the violation of each a felony. The statute makes it unlawful for (1) Any group of two or more expressly owned manufacturing plants or their agents to agree upon or fix prices of milk products; (2) for any group of two or more expressly owned manufacturing plants or their agents to divide or assign any territory in the State of Missouri served by a cream buying station to any manufacturer licensed by the new Dairy Law; (3) for any group of two or more expressly owned manufacturing plants or their agents to assign or attempt to assign any cream buying station to any manufacturing plant; (4) for any group of two or more expressly owned manufacturing plants or their agents to refuse to buy cream or milk offered for sale at the regular price then being paid by such manufacturing plant to other cream stations or sellers; (5) for any group of two or more expressly owned manufacturing plants or their agents to agree not to purchase said cream or milk from said cream station or other seller, and (6) for any group of two or more expressly manufacturing plants or their agents to agree, or attempt to agree, that cream stations must, should or ought to sell their products to any particular manufacturer.

The violation of the act is made a felony punishable as set out above.

As stated above, the Anti-Trust Statutes and Section 28a are very similar in their nature, and, in the absence

of any decisions, in interpreting the latter section, we quote from two decisions discussing the Anti-Trust Statutes. In Heim Brewing Company v. Belinder, 97 Mo. App. 64, l. c. 69, the Kansas City Court of Appeals said:

"Any one may exercise a choice as to whom he will sell his goods, but he can not enter into a contract whereby he binds himself not to sell, for in such instance he barter away his right of choice, and destroys the very right he claims the privilege of exercising. After entering upon such agreement, he is no longer a free agent."

In Dietrich v. Cape Brewery and Ice Company, 315 Mo. 507, 286 S. W. 38, l. c. 43, the Supreme Court of Missouri approved the foregoing case, and stated:

"Argument is advanced, founded upon the right of a person engaged in a business private in character, to buy from whomsoever he pleases, to sell to whomsoever he will, or to refuse to sell to a particular person. The right does not extend to the allowance of an agreement and concerted action thereunder of such person with others similarly engaged, in the accomplishment of a common design, to destroy the business of another, or to the making of an agreement forbidden by law, and concerted action thereunder, inflicting an injury upon the public. What the defendants could have done severally by independent action, is essentially different from what they might do collectively, pursuant to an agreement between themselves and by concerted action thereunder. Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S. W. 691; State ex rel. v.

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People's Ice Co., 246 Mo. (168)
221, 151 S. W. 101; State ex inf.
v. Armour Packing Co., 265 Mo. (121)
148, 176 S. W. 382.'"

Both of the foregoing citations were quoted by our Supreme Court in *Reisenbichler v. Marquette Cement Company*, 108 S. W. (2d) 343, l. c. 345, approved without reservation. It appears, therefore, that any person may exercise a choice as to whom he will sell his goods or from whom he buys them so long as he acts individually, but that he is guilty of an offense when he combines or conspires with others to lessen free trade or competition.

In view of the foregoing authorities, it is the opinion of this department that a creamery may refuse to buy cream from any cream station or milk producer at any time so long as it exercises its individual discretion in the matter and does not combine or agree with others to refuse to buy from any milk producer or cream station.

Respectfully submitted,

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APPROVED:

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RLH:VC