

94-23
12/15/95

IN THE MATTER OF THE NATURAL PRODUCTS
MARKETING (B.C.) ACT

AND

IN THE MATTER OF AN APPEAL
OF FOREMOST FOODS LTD.
FILED OCTOBER 21, 1994

BETWEEN:

FOREMOST FOODS LTD.

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

AGRIFOODS INTERNATIONAL COOPERATIVE LTD. and
BRITISH COLUMBIA MILK PRODUCERS ASSOCIATION

INTERVENORS

DECISION

On October 21, 1994 Foremost Foods Ltd. appealed the British Columbia Milk Marketing Board's October 18, 1994 decision to not reimburse certain freight charges on the grounds that the actions and determinations of the Board constituted errors of fact, errors of law and/or jurisdictional errors. Foremost took issue with:

1. The use of statutory power for the levying of non-class 1 freight charges;
2. The Board's definition and determination of class 1 milk and production receipts;
3. The denial of Foremost's claim for \$1.10 handling charges.

Before the appeal can be dealt with the Parties have agreed that a number of preliminary issues must be determined. These are:

1. Is the appeal out of time?
2. If the appeal is out of time, are there any special circumstances for extending the statutory time limit?

3. If the appeal is to be heard, does the British Columbia Marketing Board have the jurisdiction to refund freight charges?

Facts

1. Foremost Foods Ltd. is a processor of milk in the Province of British Columbia. Foremost's sole dairy processing plant is located in Burnaby, B.C.
2. All of the milk processed by Foremost is obtained from independent producers or from the milk pool.
3. Under the marketing scheme, the Milk Board has the power to direct product. However, historically the Milk Board allows producers to choose the processor to which they wish to sell their milk.
4. There were 18 Okanagan dairy producers who chose Foremost as their processor of record during the time in question.
5. In reality, Foremost did not receive milk from the Okanagan producers at their own plant but rather the milk was transferred directly from the Okanagan producers to the Agrifoods processing facility.

6. Minutes of a Milk Board meeting conducted on December 18, 1984 confirmed that the Board agreed to institute a uniform policy respecting the pooling of freight and handling costs on transfers for class 1 purposes.

7. Minutes of a Milk Board meeting conducted on January 10, 1985 confirmed that the Milk Board approved the claiming of freight charges against the producer pool for milk moved between vendors for class 1 purposes in the Fraser Valley region. This policy became effective January 1, 1985.

8. A letter dated February 7, 1985, from Mr. Thorpe, Administrator of the Milk Board, advised Foremost Foods Ltd. that effective January 1, 1985 the policy respecting the charging of freight and handling on the transfer of milk for fluid purposes had been amended by the Board to accept freight claims on transfers at the rate of \$.65 per 100 litres.

9. The effect of the foregoing decision was to relieve Foremost of a portion of freight charges after January 1, 1985.

10. On October 24, 1986 the Milk Board invited Foremost to attend a meeting on October 29, 1986 to discuss the Board's policy on freight handling and accommodation charges.

11. Minutes of a Milk Board meeting conducted on October 27, 1986 confirm that the proposal for revising the policy for the administration, freight and handling charges resulted in no change from current policy. In effect, the Milk Board made the decision to affirm the policy already in place.

12. By letter dated March 23, 1987, Foremost demonstrated that it clearly understood that the milk it received from its Okanagan producers was included as class 1 production for the purposes of the Milk Board calculations.

13. In that letter, Foremost complained about the calculation but did not take any action other than to request that the transfer of two Foremost producers to another processor not be approved.

14. During the time in question Foremost reported the milk its Okanagan shippers shipped to Agrifoods on D-147 forms each month.

15. The Milk Board produced and sent to Foremost monthly statements calculating the amount of freight due by Foremost. In that statement the milk from the Okanagan shippers was treated as received by Foremost in calculating the 110 percent even though the milk had not been physically delivered to Foremost.

16. In the fall of 1993 Foremost elected to terminate its arrangement with its Okanagan producers thus making those producers free to find another vendor for their milk. Apparently, the Okanagan producers chose to ship their milk to the Foremost processing facility in Burnaby.

17. On July 12, 1994 Foremost sent a letter to the Milk Board claiming that Foremost had been wrongfully charged \$281,260.16 for freight charges in respect of milk transferred from Okanagan producers to Agrifoods in Vernon and Armstrong throughout the period of 1988 to 1993.

18. The Milk Board responded to the July 12, 1994 letter on August 12, 1994. In that letter the Milk Board clarified the freight charge calculation and denied Foremost's request for reimbursement.

19. By letters dated September 8, 1994 Foremost Foods Ltd. sought confirmation from the Milk Marketing Board that the 30 day time limit on the right to appeal did not commence until discussions between Foremost and the Milk Board had been concluded.

20. By letter dated September 20, 1994 the Milk Board advised that following the receipt of requested correspondence, the Milk Board would provide a response from which the 30 day time limit on the right to appeal would commence.

21. By letter dated October 18, 1994, the Milk Board denied Foremost's request for reimbursement.

Discussion

Based on the evidence of Peter Knight and the submissions of counsel, it appears that there is very little dispute as to the facts. The contentious issue is when was an order, decision or determination made such that the time limit for Appeal began to run.

In December 1984, a decision was made by the then Milk Board to allow for reimbursement of certain freight charges. It appears that this practice of charging freight went unchallenged. In October of 1986, the Milk Board made a decision to continue this policy without change. Foremost was made aware of this decision by letter dated December 5, 1986. Had Foremost felt that this decision was unfair or inequitable, their recourse at the time was to appeal to the Milk Board or the Supreme Court of British Columbia.

It was the evidence of Mr. Knight was that he was an employee of the Milk Board from 1973. He assumed his current position with the Board in 1986. Mr. Knight determined what portion, if any, of a vendor's freight charges would be reimbursed from the producer's pool. If the milk was used for a class 1 sale then the freight

charges would be reimbursed. If the milk was used for an industrial purpose then the receiving vendor was responsible for the freight cost.

Mr. Knight used the D-147 forms to calculate freight charges. Each processor is responsible for completing the D-147 on a monthly basis. Mr. Knight balanced the amount shipped against the amount received to the last litre and one tenth of a kilogram. Although Foremost did not receive the D-147 of Agrifoods, we as a Board are satisfied that Foremost was aware of how much milk it received from another processor.

The Appellant placed Mr. Knight's interpretation of G.O. 110 s. 6.01 (c) in issue. Mr. Knight conceded that he had never sought clarification from the Milk Board as to whether milk transferred in bulk form from the farm could properly be considered a class 1 sale for the purposes of G.O. 110.

The definition of class 1 milk in G.O. 110 is "qualifying milk utilized by a vendor for sale or transfer in fresh form". It was Mr. Knight's evidence that "class 1 sales" as it is used in the milk industry and as it has been used for many, many years, refers to qualifying milk actually sold in packaged form. While this is an interesting argument, it goes to the merits of the appeal and therefore it is not necessary for this Panel to determine this issue at this juncture.

The Appellant has argued that until July of 1994 there was no order, decision or determination from which Foremost could appeal. It was not until an actual question was placed before the Milk Board by letter that the Milk Board made a decision as to the entitlement of Foremost for reimbursement. This argument appears on the surface to have some merit however, it can not be accepted by this Board. The logical outcome of such an argument is to allow a Party to re-open any issue by simply placing a request before the Board. When the Board rendered a decision on that request automatically a new 30 day appeal period would arise. This can not be what is intended by section 11 of the Natural Products Marketing (BC) Act.

This Panel has come to the conclusion that Foremost was aware of the Board's decision or order reconfirming the freight charge policy by December 1986 or at the very latest by March of 1987. The March 23, 1987 letter from Foremost to the Milk Board is evidence of the knowledge Foremost had at that time.

The question then arises, are there any special circumstances which this Panel should consider so as to extend the period of time for Foremost in filing their appeal?

After hearing the evidence and reviewing the submissions of counsel, it is this Board's view that no special circumstances exist which militate in favour of Foremost Foods Ltd.

In fact, if special circumstances do exist they favour the Milk Board. If there was a variation in the freight charges assessed against Foremost for the period 1988-1993, the question would arise as to who the proper party would be to pay? Evidence was given that the present producer pool which would be required to pay out any credited freight charges could in fact have some different members than during the period of time when the appeal arose.

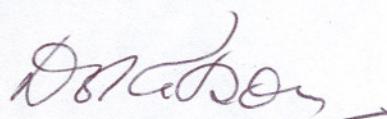
Further, there is the underlying question which has never really been answered. Why would Foremost, a large company and a sophisticated party with the ability to retain counsel, not bring an appeal in a timely fashion? Why would this issue have been left for 7 or 8 years? Clearly this is a question which is beyond the capacity of this Board to answer. However, should there be prejudice to any party as a result of this lengthy delay surely that prejudice should not be laid at the feet of a new producer pool.

Order

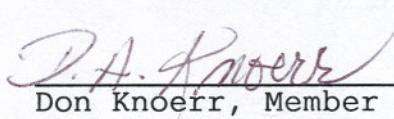
Accordingly this Board finds:

1. The Appeal is out of time;
2. There are no special circumstances which warrant an extension the time for filing the appeal;
3. Given the foregoing two findings, it is unnecessary to answer the third issue.

Dated at Victoria, British Columbia, this 15th day of December, 1995.



Doug Kitson, Chair


D. Knoerr
Don Knoerr, Member

Karen Webster
Karen Webster, Member

Christine Moffat
Christine Moffat, Member