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Supreme Court of the United States

OCTOBER TERM, 1969

Office Supreme Court, U.S.
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 JOHN F. DAVIS, CLERK

In the Matter of:

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Docket No. 25

FREDERICK T. ZUBER, et al.

Petitioners

vs.

RUSSELL ALLEN, et al.

Respondents

-----X

Docket No. 52

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE,

Petitioner

vs.

RUSSELL ALLEN, et al. Duplication or copying of this transcript
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Place Washington, D. C.

Date October 16, 1969

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October Term, 1969

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FREDERICK T. ZUBER, et al.,
Petitioners

vs. No. 25

RUSSELL ALLEN, et al.,
Respondents

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CLIFFORD M. HARDIN, SECRETARY OF
AGRICULTURE,
Petitioner

vs. No. 52

RUSSELL ALLEN, et al.,
Respondents

----- X

Washington, D. C.
October 16, 1969

The above-entitled matter came on for argument at
11:50 a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Gentlemen, as you observed, I sat on this case in the Court of Appeals and therefore will not participate in the hearing. I will yield and Senior Justice Black will preside and carry on.

Thank you.

ARGUMENT OF DANIEL M. FRIEDMAN

ON BEHALF OF PETITIONER HARDIN

MR. FRIEDMAN: Mr. Justice Black and may it please the Court:

The principal question in these consolidated cases which are here on certiori to the Court of Appeals of the District of Columbia Circuit is whether the Secretary of Agriculture has authority under the Agricultural Marketing Agreement of 1937 to include in milk marketing orders a provision for the payment of a premium to farmers who are located close to the center of the milk market.

More specifically, the case involves the validity of the so-called farm differential payments in the Boston-Rhode Island milk order under which farmers whose farms were located within 40 miles of the center of the market obtained a differential over and above the blended price that all farmers receive of 46 cents per 100 pounds of milk, which is the equivalent of one cent a quart.

Also there is a provision in the order which provides

1 for payment of 23 cents a hundred pounds for farmers who are
2 located in the next area, in effect, 40 to 80 miles from the
3 center of the market, but that involves a small percentage of
4 the differentials involved under the order and I therefore shall
5 limit my discussion to the consideration to equally applicable
6 46-cent differential.

7 The present case brought as a class action is by
8 farmers in Vermont who are located beyond the area covered by
9 these differentials and therefore under the order are not eligi-
10 ble for them. The District Court and the Court of Appeals in
11 this case held that the statute does not authorize these par-
12 ticular differentials and enjoined the enforcement in paying of
13 the differentials.

14 In so ruling, the Court of Appeals relied squarely on
15 an earlier case, which I shall discuss, called Blair against
16 Freeman, which struck down a similar differential in a New York-
17 New Jersey milk marketing order. Now I will say at the outset
18 that these decisions of the Court of Appeals saying that the
19 Secretary has no authority to include these differentials is
20 contrary to a decision of the Court of Appeals for the First
21 Circuit in 1939, 30 years ago, which specifically held these
22 particular differentials.

23 To put the statutory issues in the appropriate frame
24 of reference, first, I would just very briefly like to refresh
25 the Court on what I am sure is already very familiar to it,

1 the peculiarities and the way in which milk is sold and the prob-
2 lems that require this kind of legislation, and then I would like
3 to discuss the legislative history of the statutes and, finally,
4 I would like to describe the administrative background of this
5 order and its predecessors.

6 We start with the fact, of course, that milk basically
7 has two uses: First, the use of milk as fluid milk for drinking
8 purposes, which is known as Class 1 use, and then the use of
9 other milk for manufactured purposes, butter, cheese, ice cream,
10 which is known as Class 2 purposes.

11 The demand for so-called fluid milk, milk for drinking
12 is relatively static throughout the whole year. But unfortu-
13 nately for the milk industry, production of the cows is not
14 static. The cows produce more milk in the spring and in the
15 summer than they do in the fall and the winter, so this means
16 in order to meet the uniform demand for Class 1 milk throughout
17 the year, it is necessary to have sufficient cows to produce
18 that amount during the winter months when they are not producing
19 as much and, accordingly, the result is in the spring and summer
20 months there is a surplus of milk production.

21 Milk, of course, is a highly perishable commodity.
22 And the result is that milk that is produced a great distance
23 from the market cannot compete with locally produced milk for
24 the Class 1 use, but of course it can compete for the Class 2
25 use. That is, in the Boston market fresh milk from Wisconsin

1 cannot compete with Massachusetts milk, but obviously manufactured
2 cheese from Wisconsin usually competes with manufactured cheese
3 from the Massachusetts area.

4 Now traditionally milk which is used for Class 1 pur-
5 poses commands a substantially higher price on the market than
6 milk which is used for Class 2 purposes. Now the result of this
7 combination of factors has been that without any regulation
8 drastic and devastating cut-throat competition developed among
9 the farmers to try to get their milk sold for the Class 1 use,
10 which would yield them a higher amount. The dairies, for exam-
11 ple, would play different farmers off against each other, driv-
12 ing the prices down, and as a result of the kind of depression in
13 the early 1930's milk prices have been drastically reduced and
14 in some instances farmers were forced to sell milk at less than
15 their cost.

16 Now in order to stabilize this completely disorganized
17 market, two purposes were achieved. First, it was important to
18 raise the price of milk and, secondly, it was important to avoid
19 destructive competition amongst farmers to try to get access to
20 this Class 1 market. And the Secretary in the Boston area has
21 followed the same practice that he has followed in most other
22 areas. He employs a system of so-called market pooling under
23 which the amount each farmer receives for his milk does not
24 depend upon the particular use that that farmer's milk is put.

25 He gets the same price whether or not his milk is used

1 for Class 1 purposes or in some blend. The way this is done is
2 by the use of a so-called blended price under which the Secre-
3 tary of Agriculture sets minimum prices for Class 1 and Class 2
4 and then determines how and for what purposes all the milk sold
5 on the market has been used and on this basis calculates the
6 total value of the milk and then, in effect, divides this by the
7 total volume and ends up with a blended price which each farmer
8 is to receive. And by definition his price, of course, is less
9 than the Class 1 price and something more than the Class 2 price

10 Now the particular milk dealers, the dairies and manu-
11 facturers, who in the statute are called "handlers," what happens
12 to them is that if a particular dealer sells more milk in the ---

13 Q Make yourself ---

14 A Yes, I will explain it. It will take me just one
15 minute.

16 If a particular dealer sells more of his milk for
17 Class 1 use, which means he under this calculation receives
18 more than he has to pay his dairy, he in effect pays into this
19 producer settlement fund the excess. Conversely, if more of the
20 milk is used for Class 2 purposes so he would not get enough on
21 this calculation to pay his farmers what they are entitled to, he
22 draws on this producers settlement fund and the result is every-
23 one gets the same price.

24 Mr. Justice Black, may it please the Court, I want to
25 make one thing clear that in determining the blended price paid

1 to all farmers under the statute, these differentials are
2 deducted before this is calculated. That is, out of the pool
3 which is divided among all farmers, they first pay out the
4 various statutory differentials. And that, of course, is why
5 we have this case.

6 The effect of taking out the 46-cent farm differen-
7 tial in the Boston milk market is to reduce by 12 cents the
8 blended price that is paid to all the farmers.

9 Q So it comes off the top of it?

10 A That's right, they come off the top and then what
11 is left is divided up and the them of my argument will be that
12 that is precisely as Congress intended the scheme to be.

13 Now, these farm location differentials had their ori-
14 gins a long time ago in the marketing practices of the 1920's,
15 long before there was any Federal regulation. At that period
16 under contracts that various of the dairies had with the coopera-
17 tives farmers whose farms were located close to the Boston area
18 received a great amount for their milk than farmers whose farms
19 are located a great distance away.

20 When I say a "great amount," I want to stress one
21 thing, because that is challenged by our opponents. This was
22 an amount that exceeded the difference in the cost of transpor-
23 tation between bringing milk in from the distance and from nearby.
24 The indications were that these men received roughly \$1 more per
25 hundred pounds, which again is a very rough estimate, very close

1 to the 46 cents they now receive under the Boston ---

2 Q What was the economic justification for that?

3 A Well, there are a number of them, Mr. Justice.

4 One of them was the fact, of course, that the farmers located
5 close to the market were traditionally able to sell more of their
6 milk for Class 1 use, which produced the highest price. In addi-
7 tion to that, the farmers who were close in over the years have
8 been able to make their milk production more even, which was an
9 advantage to the handlers of the dairies.

10 Q Why should they just because of their geographic
11 location?

12 A It is not so much the geographic location. It
13 just developed over the years that they found in order to do
14 business with the handlers who were selling the most of the
15 milk in Class 1 use, it was important for their relationship that
16 they have an even production.

17 Q But you can't -- how do the cows know that?

18 A Well, this entails apparently some very involved
19 farming practices through the use of artificial insemination.
20 They are able to some cost to spread the milk production over.
21 The expression they use is "the cows freshen" and apparently
22 the cows freshen, some of them in a way that they produce their
23 milk in the fall and winter rather than in the spring and summer,
24 and that is the technique they use.

25 Now there is another advantage to the producers of

1 having this relationship with the nearby farm. These men were
2 available in the event of an emergency, that is, in those days
3 if late in the day somebody discovered they needed more milk, they
4 could just send a truck out and get this milk more easily than
5 if they had to go a great distance away and you didn't have the
6 modern methods of refrigeration. And of course in bad weather,
7 if you had a very bad snow storm, it would be much better to
8 have the source of supply nearby.

9 Now Congress passed the Agricultural Adjustment Act in
10 1933; very early in the administration of this Act the Secretary
11 issued a so-called license for the Boston order. This was the
12 predecessor to the present order type of arrangement. And under
13 this license, the license continued the previous advantage that
14 the nearby farmers had enjoyed. That is, the nearby farmers
15 got more for their milk than the distant farmers.

16 To be sure, it was not in the present form of a dif-
17 ferential. It was not paying them a certain amount over and
18 above the regular price. It was, however, reflected in a higher
19 price paid for milk from the nearby farmers than was paid for
20 the distant farmers.

21 Two years later for reasons unrelated to the differ-
22 ential the Boston license was invalidated by a District Court
23 decision. Partly as a result of this Court's decision in the
24 Schechter case Congress in 1935 amended the Agricultural Adjust-
25 ment Act. The amendment added the identical language that is

1 now in Section 8c(5), which I will come to in a couple of minutes,
2 dealing with milk marketing orders.

3 And in making these amendments the committee report
4 stated the provisions dealing with milk marketing and distri-
5 bution, and I quote, "followed the methods employed by coopera-
6 tive associations of producers prior to the enactment of the
7 Agricultural Adjustment Act."

8 Now shortly thereafter a new order was issued for
9 Boston in 1936. This order for the first time specifically
10 provided for higher prices to any farmer whose farm is located
11 within 40 miles of the Statehouse, Boston. Again it provided
12 but not through the mechanism of differential a premium to these
13 nearby farmers of approximately 46 cents. This was done by pro-
14 viding that these nearby farmers would receive the Class 1
15 price rather than the somewhat lower blended price.

16 This order remained in effect for almost six months
17 when the District Court in Massachusetts held the amended
18 statute unconstitutional. The Secretary suspended the order and
19 the order remained suspended until Congress had passed the Agri-
20 cultural Agreement Act of 1937. That Act utilized an order in
21 the identical language dealing with milk marketing orders which
22 had been under the 1935 amendment of AAA.

23 In addition to this, there was a specific provision in
24 the 1957 Act, Section 4, that stated that it expressly ratified,
25 legalized and confirmed all existing licenses, market order and

1 provisions that had been issued under the Agricultural Adjust-
2 ment Act and its amendments.

3 The Secretary reinstated the farm location differen-
4 tial in the milk marketing order in 1937 and this time for the
5 first instance explicitly provided for the 46-cent and then the
6 23-cent differential, depending upon the distance from Boston.

7 Since that time, since 1937, every milk marketing
8 order the Secretary has issued in this New England area has
9 included similar differentials, both the amount of 46 cents and
10 the 40 miles from the center of the market. These included 1949
11 marketing orders of Springfield and Worcester, 1958 when he
12 adopted an order for Southeastern New England consisting of
13 Rhode Island and Southern Massachusetts and, finally, in 1964
14 when after extensive hearings the Secretary consolidated the
15 four previous orders for this area into the present order.

16 I would just like to quote three sentences which we
17 set forth in our brief on pages 16 to 18, in which the Secretary
18 explained why in 1964 he was rejecting both proposals to elimi-
19 nate the differential and proposals on the other side that the
20 differential should be increased.

21 He said as follows: "Such farm location differentials
22 have been in effect under several New England orders since the
23 inception of the orders. The differentials were adopted to
24 reflect in the pricing structure of the order the historical
25 price relationships by location which prevailed in these markets."

1 Q Where are you reading?

2 A Pages 14 and 15 of our brief. It was also con-
3 tained in the record.

4 Q I have that. Thank you.

5 A It was found that customarily somewhat higher
6 values above those which normally reflected transportation
7 costs attached to milk produced near the consumption centers as
8 compared to market value of milk produced in the more distant
9 areas of the milk shed.

10 So if I may just very briefly recapitulate what I
11 believe we have before us is the following: First, since before
12 the time of Federal regulation farmers located close to the
13 Boston and New England milk marketing areas have always received
14 more for their milk over and above the transportation differen-
15 tial than farmers located further away.

16 Secondly, that when Congress in 1937 passed the Agri-
17 cultural Adjustment Agreement Act, it ratified, confirmed and
18 legalized all previous licenses, order and provision, which of
19 course includes the nearby differential provision of the Boston
20 order.

21 Just in passing, the Court of Appeals discounted this
22 and said it believed that all that provision was intended to do
23 was avoid a lapse under the statute and we have explained in our
24 brief while we think that was one of the purposes, the legisla-
25 tive history also indicates that it was further intended to

1 approve and confirm and ratify everything that it had done
2 before.

3 I would now like to turn to the statutory provisions
4 involved in the case, which we think determine the control of
5 legality of this farm location differential. They are set out
6 at the bottom of pages 2 to 4 in our brief and it begins with
7 the statute speaks of milk and its products, terms and condi-
8 tions or orders and says in the case of milk orders pursuant to
9 this section shall contain one or more of the following terms
10 and conditions and, except as provided elsewhere, no others --
11 and then over at the bottom of page the milk order may provide for
12 the payment to all producers and associations of producers
13 delivering milk to all handlers of uniform prices from milk so
14 delivered irrespective of the uses made of such milk by the
15 individual handler to whom it is delivered.

16 And then it goes on to say, "Subject only to adjustments
17 for volume, market and production differentials customarily
18 employed by the handlers subject to such order."

19 Now the Court of Appeals found that these orders were
20 beyond the Secretary's authority for two reasons: First, they
21 apparently believed irrespective of use provision barred any
22 consideration of the fact that historically farmers were receiv-
23 ing a higher amount for their milk because a larger portion of
24 it was available and used for Class 1 purposes; and secondly,
25 the Court said this, in any event, was not a market differential
as that term is used in the statute.

1 First I would like to turn to the question of the
2 "irrespective of uses" clause, which the Court in this case
3 relied squarely on the prior holding in Blair, and after saying
4 that it accepted naturally the holding in Blair, the Secretary
5 was barred from taking any account of the prior use of the milk,
6 it then went on and examined what the Secretary had said in this
7 case and concluded on the basis of the statements at the time,
8 he promulgated all the orders, that in fact he had relied on
9 this inadmissible factor.

10 Now we think that contrary to the view of the Court
11 of ---

12 Q Did the Secretary try to bring the Blair case
13 up here?

14 A No, the Secretary did not, Mr. Justice. The rea-
15 son for that is that when we studied the case, we felt there
16 were various factors in it that would not make it an appropriate
17 vehicle for appeal by this Court.

18 Q Is it different from the present case?

19 A Yes, Mr. Justice. For one thing in the Blair
20 case the Secretary had relied solely on the fact of the use of
21 the milk, that is, the higher percentage class use, Class 1 use,
22 whereas in this case we think he has indicated the other factors.

23 Secondly, in the Blair case the Secretary relied solely
24 on the claim not that this was a market differential, but that
25 was another of the statutory differentials relating to the place

1 at which the milk was delivered. That was the sole basis between
2 the Blair case and for those reason, quite frankly, we did not
3 feel the case would be an appropriate one to take to this Court
4 for presenting the broad question of the Secretary's authority
5 to include these provisions.

6 Now this clause, it seems to us, the "irrespective of
7 use" clause, it seems to us, had nothing to do with differentials
8 at all. Rather, its purpose is to make it clear that the Secre-
9 tary may pay a uniform price to all farmers, even though a par-
10 ticular farmer's milk was sold for the higher Class 1 use than
11 someone else's milk. Indeed, it was that factor that was the
12 basis for the unsuccessful attack in this Court in the Rock
13 Royal Cooperative case in 307 U. S. upon the home market equali-
14 zation program.

15 The contention there was it denied a farmer whose
16 milk was being used for Class 1 purposes, it took his property
17 without due process of law and it was discriminatory, but he
18 wouldn't get the full value of his milk but he would get only
19 the blended price.

20 And we think in Stark against Wickard, it is very
21 clear that that is the sole purpose of that.

22 Now, of course, under this arrangement all of the
23 farmers, all of the nearby farmers, get the identical price for
24 their milk without regard to the use made of their milk made by
25 the particular handler. The statute speaks of the usage made of

1 such milk by the individual handler to whom it is delivered.

2 Every single one of the farmers located within this
3 nearby area gets the blended price plus the differential. He
4 gets it whether his handler sells all of his milk for Class 1
5 use, all of his milk for Class 2 use or some blend.

6 Now we therefore think that the validity of these dif-
7 ferentials does not at all depend on the "irrespective of use"
8 clause, that the way you determine the validity of these differ-
9 entials is looking to the next clause, which deals with the
10 adjustments and differentials. And therefore it seems to us
11 the critical question in the case is whether these differentials
12 are market differentials customarily applied by the handlers.

13 The Act, of course, does not define market differen-
14 tials, and we think what this phrase means is a differential
15 that customarily has been applied by the handlers in the market.

16 Now in the light of the history of the history I have
17 given, the statutory history ---

18 Q How about this phrase you are talking about the
19 one appearing on the bottom line of page 3?

20 A Yes, the (a). It would be ---

21 Q Market differential.

22 A --- market differentials over the top customarily
23 applied by the handlers, et cetera.

24 Now we think that in the light of the history I have
25 given, the previous experience before Federal regulation, the

1 history has shown that Congress intended to adopt the procedures
2 formerly applied by the cooperative, the confirmation, ratifica-
3 tion of 1937, that this definition cannot be given the very nar-
4 row reading that the Court of Appeals gave it.

5 The Court of Appeals said that all that is covered by
6 the phrase "market differential" is payments which a farmer
7 receives for delivering his milk to the city plant rather than
8 to the country plant. That is a differential for delivering,
9 they say, in the city market rather than the country market.

10 That interpretation rests on a statement in the commit-
11 tee reports which so describes the market differential. We think
12 in the light of all this history, that this description was
13 merely intended to be illustrative of the type of market differ-
14 ential and it was not intended to define the outer limits of the
15 differential. As set forth in our brief it is somewhat compli-
16 cated the reasons why this language was construed as the Court
17 of Appeals constructed it, it would not be particularly meaning-
18 ful, there would be other phrases of this statute that would
19 embrace the type of differential the Court of Appeals thought
20 was the market differential.

21 Now as I have pointed earlier, in 1939 the First Cir-
22 cuit upheld the validity of the market differential in the 1937
23 Boston milk marketing order and this explicitly held that there
24 were market differentials. And in addition to that, as we
25 develop in our brief, we think this Court's decision in the Rock

1 Royal case, although it dealt not with differentials paid on a
2 market-wide basis by individual handlers, nevertheless since the
3 operative language of the two sections of the statute is the
4 same as equally applicable.

5 Q What do you think the committee report meant?

6 A I think it just suggested that this was one of
7 the types of things. I don't think it can fairly be said that
8 the committee was saying that is all a market differential means.
9 I think in the light of the history and the broad language of the
10 market differential, it was intended to give the Secretary the
11 authority to continue these payments.

12 Mr. Justice, I think the whole history of this statute
13 shows that what Congress was trying to do in this case was to
14 stabilize the milk market, to eliminate the cut-throat competi-
15 tion within the existing pricing structure. It is not intended
16 to radically alter the relationships that had existed for many
17 years among the different groups of producers.

18 Q Do you have the end-use as being the test for
19 justification for any differential?

20 A Mr. Justice, it was the fact that payments were
21 tied to the end-use that led to this drastic and devastating
22 competition among the farmers driving down the price. What they
23 were attempting to do, it seems to us, was to eliminate a
24 factor leading to the depression of milk prices and farmers fight-
25 ing each other to see which one could have the greatest share

1 of the Class 1 market and preventing the handlers from using
2 this as a lever to fight them. But once that was accomplished,
3 once that type of competition was eliminated, it seems to us
4 that what Congress was trying to do was to say that this was as
5 far as we could go.

6 You could eliminate this type of pricing competition.
7 It was not to be the radical realignment, the radical changing
8 of the structure of the milk marketing that results from this
9 decision below.

10 Now the respondents repeatedly tell us this is a very
11 unfair thing, that the effect of this differential is basically
12 requiring the farmers in the distant markets to subsidize the
13 nearby farmers. And they say, "If in face this nearby milk
14 has some value to the handlers, let the handlers pay for it.
15 Don't make us pay for it."

16 This again seems to us to rest on the stated notion
17 that under the Act all farmers are to be treated equally. We
18 think under the Act what it is is that all farmers are to be
19 treated equitably. That is, they are to receive the same prices
20 subject to the various differentials provided. And if, as we
21 believe, the market differentials that here are permissible, the
22 farm location differentials are valid as market differentials,
23 it seems that it is quite immaterial with the effect of paying
24 these differentials is to reduce the blended price.

25 That is precisely, we think, what the statute contemplates

1 and if the handlers were given the discretion to decide to whom
2 to make payments for the additional values, how much under
3 what circumstances, it is very clear. This would be exactly
4 the sort of thing that Congress was trying to prevent, the same
5 kind of cut-throat competition that you had back in the early
6 days.

7 Finally, the argument, it seems to us, rests on a
8 dubious factual assumption. The assumption is that somehow if
9 you eliminated the nearby differential and increased the distant
10 price, the farmers would be much better off. Of course, they
11 would be much better off immediately. They would get 12 cents
12 more a hundred pounds, but it doesn't follow at all that in the
13 long run that they would be any better off, because once you
14 increase the blended price in the Boston market, the result is
15 likely to be that handlers operating in other areas will begin
16 to bring to bring their milk into the Boston market. This will
17 create a surplus and this will, in turn, result in depressing
18 the price in the Boston market and the end-result for all that
19 is appears is that the prices may be driven down and even below
20 the present level.

21 Then there is another problem, which is that everyone
22 knows farmers are having a hard time today. The nearby farmers
23 for more than 30 years have acted on the assumption they would
24 receive these differentials. These differentials, if they are
25 suddenly terminated, there is reason to believe that a large

1 number of nearby farmers in the Boston area may decide that
2 they can use their land more profitably for something other than
3 farming. They may sell out to the real estate subdividers, et
4 cetera.

5 So the end-result is likely to be a serious shortage
6 of milk for the nearby area and once again lead to great insta-
7 bility in the market.

8 Thank you.

9 MR. JUSTICE BLACK: Mr. Hollman?

10 ARGUMENT OF LAWRENCE D. HOLLMAN

11 ON BEHALF OF PETITIONER ZUBER, ET AL.

12 MR. HOLLMAN: Mr. Justice Black, may it please the
13 Court:

14 I am Lawrence D. Hollman, counsel for petitioners Freder-
15 ick T. Zuber, et al., seven nearby milk farmers located within
16 the 46-cent or nearby zone within the Massachusetts-Rhode Island
17 milk marketing area.

18 They and some 2,000 other farmers have been consistently
19 for over 30 years under Federal orders recipients of the nearby
20 differentials at the identical rates that are now in effect, 46
21 cents and 23 cents, either under the Massachusetts-Rhode Island
22 order or under the constituent Boston and secondary market orders
23 which were consolidated in 1964.

24 Essentially these are farmerly who deliver their milk
25 to urban centers with the concentrated populations of New

1 England, Massachusetts, for example, in Boston, of Worcester,
2 Springfield, Holyoke, Fall River, cities which are fairly sizable.

3 One other point. These nearby farmers are not the
4 large and affluent farmers within the marketing area any more
5 than the distant farmers. There is evidence in the original
6 record, affidavits that were submitted by these seven nearby
7 farmers filed as Government Exhibit 3, in support of its opposi-
8 tion of preliminary injunction, which indicate that their return
9 on investment is a very meager one and that without the nearby
10 differential, that could well shift their meager profits to
11 losses as a result of their varying operations.

12 Q What differential did you say you have been
13 receiving?

14 A The nearby differential, Mr. Justice Black. That
15 is the farm location differential either under the Massachusetts-
16 Rhode Island marketing order or under the ---

17 Q How much?

18 A It was 46 cents and 23 cents, Your Honor.

19 Q 46 cents a hundredweight.

20 A That's right, the same identical rate under the
21 Boston order originally promulgated in 1937 after the Agricul-
22 tural Marketing Act of '37 and under the secondary marketing
23 orders, which were promulgated by the Secretary in 1939 for
24 Worcester and Springfield and in 1958 for Southeastern New Eng-
25 land.

1 Approximately the same differentials were also paid
2 under the 1936 Boston order of the Secretary and essentially
3 the same in substance. That is, the same amount, the same people
4 were paid under Boston licenses issued under the 1933 Act. Per-
5 haps even more importantly approximately the same amount was
6 paid to these nearby farmers before Federal regulation began.

7 Here I would like to supplement certain comments that
8 Mr. Friedman made. Before Federal regulation commenced in these
9 markets, most -- the large preponderance of the farmers in the
10 Massachusetts-Rhode Island markets, nearby and distant, were
11 members of cooperatives. These cooperatives, the largest of
12 which, I believe, at the time and still today is the New
13 England Milk Producers Association, entered into collective
14 bargaining agreements with handlers.

15 This started in the '20's and perhaps even shortly
16 before. Under these collective bargaining agreements the near-
17 by farmers received a higher price, which in effect reflected
18 the 46-cent differential that they receive today. The one prob-
19 lem that developed with respect to these collective bargaining
20 agreements in the early '30's and why Federal regulation was
21 necessary and, indeed, why the AAA, in part, was passed, was
22 because destructive competition had ensued within the market.

23 This was competition among the handlers. And let me
24 explain this. Under the collective bargaining agreements a
25 handler would agree to pay certain prices, a handler or a dairy

1 would agree to pay certain prices to cooperatives. The cooper-
2 eratives at that time were also using a system not at all dis-
3 similar, in fact quite similar, to the equalization pool and
4 blend price enforced today under the Secretary's order. Under
5 that equalization and blending classified price system the near-
6 by farmers received a higher price by approximately 46 cents
7 per hundredweight.

8 But all handlers would not enter into the agreements
9 with the cooperatives and as long as you had any significant
10 number of handlers who would not do so, they could then go to
11 other farmers within the marketplace, not members of the coop-
12 erative, and offer them a price not equal to the Class 1 fluid
13 milk price, but just slightly above the blend price that the
14 cooperatives were paying to their members under the collective
15 bargaining agreements.

16 As a result of that, they could charge lower charges,
17 these outside handlers, not members of the collective bargaining
18 agreements could charge lower prices to consumers and thereby
19 increase their consumer markets. As a result, the coops who
20 were parties to the collective bargaining agreements then had
21 to reduce their price, which means they had to put pressure on
22 their producers to take lower prices, and this kept going on
23 and on.

24 So that what Congress intended to do under the AAA of
25 '33 and '35 Acts, expressly to follow the same patterns that the

1 cooperatives had followed and they stated this in their committee
2 reports, to bring all handlers in under regulation, because it
3 is the handlers who are regulated under the orders, not the pro-
4 duers as such directly. The producers have no right to go into
5 court to appeal from an order under the statute. Their right is
6 established here, for example, under this Court's holding in
7 Stark against Wickard.

8 They can complain of any diminishment in what they
9 should rightfully otherwise get from the equalization pool,
10 but the regulation is a regulation of handlers and as long as
11 a particular farmer or groups of farmers sell to a handler who
12 markets some milk in this market today for fluid milk purposes,
13 that farmer gets the advantage of the blend price.

14 Now, in fact, the requirement here is really quite mini-
15 mal. Much of the milk that the farmers sell to handlers is used
16 for the lower price, manufacturing purposes -- cheese, butter,
17 et cetera. But because their handler may ship no more than 25
18 percent of his milk into the market for fluid purposes during a
19 few months of the year -- and I believe 15 percent during three
20 other months -- that handler qualifies all of his farmers for
21 the fluid milk price, even though most or all or a large part
22 of their milk is going for Class 2 or manufactured milk purposes.

23 I would like to comment on what the interest is of the
24 nearby farmers here, because I think there are at least three
25 points which reflect in the opinion of the Court below on the

1 equities here.

2 The farmers have consistently received these differ-
3 entials over the years and always in excess of transportation and
4 handling cost savings. Overwhelmingly these orders have been
5 approved by referendum, both the Massachusetts-Rhode Island
6 order of '64, the Boston order of '37 and the secondary market
7 orders. Each time an overwhelming approval by farmers and farmers
8 must vote to approve this -- by a vote of more than two-thirds
9 of the farmers in the market. If that vote is not obtained,
10 there is no regulation.

11 This is a unique partnership between the Secretary
12 and the farmers. And perhaps the most salient point here is the
13 nearby farmers who have voted for this order have always been
14 the minority farmers in the market. Distant farmers have, I
15 think, consistently through the years numbered well over 50 per-
16 cent, indeed over the two-thirds that is necessary to approve
17 the order.

18 Q Is the voting one farmer, one vote or does it
19 depend upon the size of his herd or the amount of his acreage?

20 A My understanding, Your Honor, is that the Assist-
21 ant Secretary employs the system of one farmer, one vote.

22 By referendum and approving the vote. Now, however,
23 Your Honor, the statute also authorizes cooperatives to vote
24 for their members, and so in this voting from time to time, I
25 think quite consistently in fact, the cooperatives do vote for

1 their members.

2 The largest cooperative in the Massachusetts-Rhode
3 Island market, I believe, Your Honor, is still today is NEMPA,
4 which is more heavily distant producers than nearby producers.

5 The vote ---

6 Q Do you say that if the nearby farmers are voting
7 against these marketing orders because of a failure to get a
8 differential, would it carry it anyway?

9 A I believe so, Your Honor. It would always depend
10 at any given time on the mix of nearby and distant farmers. I
11 think quite clearly that under the Boston order it would have
12 carried anyway, and I believe today the nearby farmers number
13 no more than one-third of those. Now it may vary between one-
14 third and 40 percent.

15 Q But a cooperative votes for its members, does it
16 do it by block voting?

17 A I believe -- why, I believe it can do it either
18 way, Your Honor.

19 Q In other words, it would be like the Electoral
20 College in a state in a presidential election, 51 percent could
21 come down on one side. Is the cooperative then empowered to
22 vote the entire membership on that side?

23 A I am not sure. If I understand your question,
24 I am not sure that the cooperatives each time internally ballot
25 or request the votes of its members on this. I believe the

1 cooperatives tend to place their votes based on what the directors
2 of the cooperatives decide. I am not sure of this, Your Honor.
3 And I think this may, indeed, vary among the cooperatives.
4 Obviously if a cooperative voted against the interests of its
5 majority, it is a simply matter for the majority either to leave
6 that cooperative or to vote out the Board of Directors.

7 Q Yes, of the majority, but I wondered -- well, I
8 guess you don't know the answer.

9 A I don't know how the internal workings of the
10 cooperative is, no, Your Honor.

11 The respondents have alleged that the '64 consolidation
12 order changed drastically the economics of the marketplace
13 insofar as the nearby differential was concerned. That simply
14 isn't so.

15 The 46-cent and 23-cent differentials were retained
16 at the identical rate they were under the constituent orders.
17 What did happen was that as a result of bringing into the Boston
18 order, which was by far the largest order here -- coming from
19 over 75 percent of the farmers in the market -- by bringing
20 in secondary markets which had high fluid use, the ultimate
21 result for those distant producers marketing in the Boston order
22 just before consolidation was to increase the amount of money
23 they received in the 12-month period after consolidation 3 cents
24 more per hundredweight than what they had received before.

25 One other point, for an obvious reason the nearby

1 farmers are interested here and, indeed, they sought to inter-
2 vene before the District Court; that intervention was denied,
3 pursued on appeal. The motion for summary reversal was filed
4 and denied by the Court of Appeals. Thereafter the District
5 Court rendered the summary judgment below, and at that point the
6 nearby farmers sought a stay of the summary judgment order in
7 aid of their appeal on intervention.

8 In that proceeding the Court of Appeals denied the
9 stay, a stay which had already been denied, in effect, to the
10 Government by the District Court. The Court of Appeals denied
11 this stay, but gave the nearby farmer applicants for interven-
12 tion the choice by mootng their appeal on the intervention
13 point to become intervenors for the purpose of filing an appeal,
14 not to enter into the District Court proceeding which had already
15 terminated.

16 In effect, that was a Hobson's choice, since for the
17 nearby farmers not to have elected that option would have meant
18 that the escrow fund would have been distributed out to the
19 distant farmers, farmers who had never relied on it. As a
20 result, the nearby farmers chose the route which enabled them to
21 prosecute an appeal. At that time the Government had not noted
22 an appeal, and also to move before the District Court for a
23 stay since the Court of Appeals had denied this appeal of the
24 nearby farmers.

25 The nearby farmers obtained that stay, and that is

1 why there is now -- when I say "stay," I mean preservation of
2 the status quo, in effect, where the escrow, the differential
3 continually is computed and added to the fund, there is now in
4 escrow somewhat over \$8 million.

5 I would like to comment on that part of the statute
6 involving the volume market and productive differentials custo-
7 marily applied. We have commented at length in our brief and
8 Mr. Friedman has already commented to you on the uniform price
9 "irrespective of use" clause of the statute.

10 With respect to the volume market and production dif-
11 ferential customarily applied, these are certainly crucial words
12 in the statute. We submit that these are price variations relat-
13 ing to marketings of milk, not all price variations, not any
14 price variations that might come into existence after the Act
15 was passed. They had to be variations that were customarily
16 paid by the handlers. Usual market variations. I believe that
17 is what this Court in the '39 decision in Rock Royal referred
18 to the matter.

19 And they had to be not sporadically applied by hand-
20 lers before the Act was passed,-- I am sorry -- before the order
21 took effect. They had to be customarily applied by handlers
22 before that.

23 Again Congress intended to preserve as much as possible
24 the free market competition that had existed before 1933 and
25 1935. The Secretary has consistently interpreted volume market

1 and production differential and market differential customarily
2 applied language to enable him to provide for the nearby differ-
3 ential in the Massachusetts-Rhode Island market.

4 This Court in Rock Royal, 20 cents of a 25-cent differ-
5 ential was borne by the pool in Rock Royal. It was not an indi-
6 vidual handler pool. I believe it was a market pool, but the
7 pool bore that 20 cents just as the pool bears today the 46
8 cents. And this Court upheld the differential in that case.

9 It was not identical with the differential involved
10 here. It provided not only for farm location, but said also
11 that farmers must deliver to plants located within the nearby
12 zone. But that in practical effect is always what nearby farmers
13 have done in the Massachusetts-Rhode Island market. They did so
14 years ago and we are advised today that virtually all nearby
15 farmer deliver to the plants within the market's core, close to
16 the major markets.

17 We believe one of the major reason that the Court of
18 Appeals went astray, as Mr. Friedman has already commented, is
19 that they made erroneous factual assumptions. They thought that
20 the differential pre-1937 was not one paid over and above the
21 transportation and handling cost savings, but one paid to dis-
22 tant farmers who delivered to a nearby zone.

23 That is factually incorrect and we have pointed at
24 length in our brief at pages 51 and 52 that that is incorrect.

25 Your Honor, if the Court pleases, I would like to save

1 the remaining time for rebuttal.

2 MR. JUSTICE BLACK: All right, Mr. Hollman.

3 THE CLERK: The light was wrong and you have more time
4 than that would indicate. You have 15 minutes.

5 MR. HOLLMAN: Then, if I may, I would like to complete
6 my argument, if the Court please.

7 Mr. Justice Harlan, you have commented on the commit-
8 tee report and what the committee report means. We have set
9 forth the committee report as an appendix in our brief and the
10 particular provisions relevant here are on page 24-A of the
11 appendix to our brief, the green brief.

12 Frankly, the committee report language regarding the
13 market differential is not a model of clarity. Among other
14 things, the report language would indicate that the differentials
15 that they were talking about were usually paid in secondary
16 markets.

17 I believe the Court in Blair said that market differen-
18 tial there depends upon the nature of the market. The nature
19 of the market, I believe, they thought of as secondary markets.
20 But in fact, not only the nearby differentials, but the country
21 station differentials, which the respondents say in the Court of
22 Appeals below says were differentials, are those in primary
23 markets and traditionally they have been paid in primary markets.

24 While the lower court did not get into the question of
25 substantial evidence, they certainly looked to certain excerpts

1 in evidence in analyzing the interpretation and construction of
2 the statute. For that reason and because we believe that if
3 this Court reverses the finding that the Secretary had the
4 authority to put a nearby farm location differential in the
5 Massachusetts-Rhode Island land market, then it can at that point
6 dispose of this case rather than remanding it.

7 I should like to comment and ---

8 Q You said if we believe what now?

9 A If you believe contrary to the Court of Appeals
10 that the Secretary had the authority and has the authority today
11 under the market differential customarily applied language to
12 put a nearby differential in the Massachusetts-Rhode Island
13 order, that is, the 46-cent and 23-cent differentials that we
14 are talking about here, this Court -- if you, in other words,
15 affirm the Secretary's power, reversing the lower court, there
16 are then possible questions of substantial evidence which have
17 been raised in the initial complain of respondents that have
18 not been passed upon by the lower court here and were not passed
19 upon by the District Court.

20 We believe that even though this is a truncated record
21 and it is a truncated record, it contains only illustrative
22 excerpts from the administrative proceedings in '64 and years
23 past, that there is sufficient evidence to support the Secre-
24 tary's determination that a nearby differential in the Massachuset
25 Rhode Island order was necessary and would support market

1 stability and, in effect, this is what he found in proposing
2 for referendum vote by the farmers and what he had to find under
3 the statute, that the order with the differential would promote
4 market stability.

5 Commenting on the evidence ---

6 Q Do you think that was essential under the statute
7 to make that finding?

8 A To make the finding that the order as a whole
9 could promote ---

10 Q No, the nearby differential.

11 A No, I don't, Your Honor. I think you need only
12 find that the order as a whole -- this is an integral inter-
13 weave of positions. I do not think ---

14 Q Is this in issue here on the whole order? In
15 this Court?

16 A Well, what is being challenged here is simply
17 the nearby differential, Your Honor.

18 Q But there was the whole order at stake in the
19 Court of Appeals?

20 A Well, no, I think just the nearby -- the Court of
21 Appeals took the position that they could strike the nearby
22 differential provision, but the order would still remain viable.
23 We took a contrary position before the Court of Appeal.

24 Q Did they leave the rest of the order standing?

25 A They left the rest of the order standing.

1 Q How could they have done it without resolving
2 whatever issues there were without facts?

3 A Oh, Your Honor, I am not sure. What they did is
4 simply go on the ---

5 Q You say there are some leftover questions about
6 evidence, whether the evidence supports a finding that it would
7 promote market stability. How could the Court of Appeals leave
8 the rest of the order standing without ---

9 A Well, we believe in short, Your Honor, that they
10 should not have done that. That it was improper for them to
11 do that, but in terms they never commented upon these substan-
12 tial evidence points. They comments only and held only with
13 respect to whether or not the Secretary had authority to put
14 the nearby differential in the order.

15 They never reached the question of substantial evi-
16 dence.

17 Q But the order is still outstanding except for
18 these provisions?

19 A Yes, because there is a separability clause in
20 the order and they premised their elimination of the differen-
21 tial ---

22 Q I know, but they left the part they thought
23 apparently was valid and left it standing?

24 A Well, the only evidence they had before them was
25 evidence regarding the differential. There was not -- there was

1 no administrative record before the Court regarding the entire
2 order.

3 They only ---

4 Q Now how can the issue -- how can we broaden the
5 scope of the case up here?

6 A We believe, Your Honor, that even these excerpts
7 which have been supplied and given the consistent administrative
8 vote on the basis of these excerpts and on the basis of the
9 consistent administrative participation by the Secretary for
10 30 years ---

11 Q We don't have the views of either of the courts
12 below on this question, do we?

13 A On substantial evidence, no, Your Honor. The
14 District Court judgment was limited to its holding on the basis
15 of Blair that an injunction would be granted.

16 I started to say that these marketing orders are not
17 something that, once promulgated or left alone -- they are deli-
18 cate and very intricate complexes of marketing and economic
19 factors. Experts pay close attention to them. Both the Secre-
20 tary and experts within his Department and the farmers them-
21 selves. There are constant amendments, suspensions, decision
22 or orders affecting each marketing order. The Boston order and
23 the Massachusetts-Rhode Island order since 1936, just those two
24 orders, have been the subject of suspensions, amendments, deci-
25 sions of orders 208 according to the records of the Department

1 of Agriculture.

2 There have been some 47 amendments to these orders
3 over the years. The farmers and the Secretary together have
4 cautiously and zealously observed the workings of the order and
5 modified it. The provisions of it are inextricably inter-
6 mingled. It is with that thought in mind that we maintain that
7 even if this Court were to believe that there were restrictions
8 regarding the statutory authority, that it would not be possi-
9 ble simply to excise simply one provision from the order and
10 leave the order standing.

11 An expert from the Department of Agriculture, one of
12 the leading experts in the dairy industry, Mr. Herbert Forrest,
13 in an affidavit to the District Court which is in our appendix
14 in the record here, stated that in his belief the elimination
15 of the differential would cause disruption and instability in
16 the marketplace. But the whole purpose of the order is to pro-
17 mote market stability.

18 If taking out this provision will promote market
19 instability, then this matter, if there are questions regarding
20 the Secretary's authority, must be remanded to enable him, we
21 believe and submit, to determine what will make the order stable.
22 He has other powers which may accomplish some of the inherent
23 economic values of the nearby differential that he can employ
24 in this regard.

25 But we also believe under the ruling of this Court in

1 Addison against Holly Hills, on the basis of that case if there
2 is any question regarding his authority of remanding an order
3 and under this Court's statement in Lehigh we believe that the
4 Secretary should then be given an opportunity to resort pro tanto
5 to the escrow fund, which we believe in any event should be the
6 property of the nearby producers who have relied on the differ-
7 ential for so many years, who have made investment decisions
8 and marketing decisions on the basis of the differential.

9 I would like now to reserve my time for rebuttal.

10 MR. JUSTICE BLACK: My Ryan?

11 ARGUMENT OF CHARLES PATRICK RYAN

12 ON BEHALF OF RESPONDENT ALLEN, ET AL.

13 MR. RYAN: Mr. Justice Black, members of the Court:

14 First, I would like to make a couple of preliminary
15 observations. This particular differential has no relationship
16 at all to any 40-mile zone from any principal consumption center
17 the City of Boston or any other city. That was true of the
18 1937 Great Boston Order, but at the present time under the con-
19 solidated orders all dairy farmers within the State of Connecti-
20 cut and all dairy farmers within the State of Massachusetts other
21 than one county are all classified as nearby producers.

22 Initially under the Greater Boston Market Order there
23 were over 7400 distant producers serving that market. They
24 supplied approximately 92 percent of the milk. At that time
25 there were 672 nearby producers and at the present time, as the

1 petitioners have indicated, there are over 2,000 -- approximately
2 2,200 nearby producers.

3 Q So the percentage under the old regime was, the
4 nearby producers was something about 8 percent or so?

5 A That is correct.

6 Q And now the percentage is what?

7 A Approximately one-third. The significance of
8 that, Your Honor, Mr. Justice, is this, that under the Boston
9 order, the distant producers -- the so-called distant producers
10 only paid under this nearby differential 2 to 3 cents per hundred-
11 weight. They did not have to pay the 46 cents simply for the
12 reason that there were so many distant producers.

13 As their numbers have been cut, and as the nearby pro-
14 ducers have increased in number, the differential that is
15 deducted from the milk price has grown. Initially it was a
16 factor that was regarded as admittedly illegal, but that they
17 could afford to wink at it, so to speak, in order to get the
18 benefit of Federal regulation.

19 But at the present time it has grown like the proverbial
20 Topsy and it has resulted in its incorporation into other orders
21 simply because of the fact that it existed in the Boston order.

22 Now in that connection I think it is important to
23 realize that this particular differential exists in only one
24 other milk order in the United States out of approximately 75
25 Federal milk marketing orders. That fact conclusively indicates

1 that it is not a vital provision. It is not a necessary provi-
2 sion.

3 The only effect that it has is to discriminate against
4 the marketings of distant producers. The only other milk order
5 which contains this particular differential is the Connecticut
6 Federal Milk Marketing Order.

7 That illustrates very graphically the injury that a
8 differential provision of this type can effect upon distant pro-
9 ducers. Under the Connecticut milk order there are only 89 to
10 95 dairy farmers that are characterized as distant or non-nearby
11 dairy farmers. There are approximately 2,000 that are charac-
12 terized as nearby dairy farmers. All of your dairy farmers
13 within the State of Connecticut are termed nearby dairy farmers,
14 even though at least 50 percent of the milk for that market
15 is supplied by out-of-state dairy farmers.

16 Now the result is under the computation in that exactly
17 reverse situation that the distant dairy farmers marketing under
18 that order have to pay 44 cents for every hundred pounds of milk
19 of their needed milk that they regularly market in the State of
20 Connecticut.

21 Now how does this benefit the Connecticut nearby pro-
22 ducer? It increases his price not by 46 cents, but by 2 cents
23 per hundredweight. That is simply attributable to the fact that
24 there are not enough distant producers to pay this differential.

25 The distant producers under that order lose from

1 \$5,000 to \$6,000 a year in order to benefit the nearby producer
2 in the amount of approximately \$12.50 a month.

3 Q You are not referring to the order in this case?

4 A Not in this case, no, Your Honor.

5 Q You are talking about the Connecticut orders.

6 A I am talking about how it exists in only one
7 other order out of about 75 in the country.

8 Q It did exist in the New Jersey order, but it was
9 knocked out in the Blair case.

10 A And that order, incidentally, is functioning much
11 better than it ever has simply because of the fact that dairy
12 farmers are able to cooperate and act in harmony.

13 Q This order covers the State of Connecticut also,
14 doesn't it?

15 A That is one reason why I brought in the Connecti-
16 cut order.

17 Q That is what confused me.

18 A It is very confusing, yes.

19 The distant farmer in Vermont, take for example, if
20 he wants to market his milk, his needed milk, although he has
21 supplied Boston, say, for over 30 years, he has to pay this
22 differential to nearby producers located in the States of Connec-
23 ticut and Massachusetts and Rhode Island. Rhode Island is a
24 very small factor. They produce only about 1 percent of the
25 milk for the market and are not significant as a factor in the

1 case. However, if the Vermont producer or the Maine producer
2 or the New Hampshire producer wants to market his needed milk
3 in the State of Connecticut, he also has to pay this same dif-
4 ferential. Only this time it is in a larger amount. By the
5 same token, the Connecticut producer collects both ways. He,
6 and the Rhode Island producer does also -- he is entitled to this
7 differential irrespective of what market his milk goes to.

8 So it is not simply a question of ---

9 Q Not all of the State of Connecticut, as I read it,
10 east of the Connecticut River plus the Towns of Granby and Suf-
11 field ---

12 A Yes, that is with respect to the order that we
13 are presently considering.

14 Q Yes.

15 A In respect to the Connecticut order, it doesn't
16 encompass the entire state and in both orders ---

17 Q In the Connecticut market.

18 A That is correct, and those are the only two
19 milk orders in the United States that have this particular pro-
20 vision.

21 Q Are there any groups of these farmers who con-
22 tend that the order, as originally or sustained by the Court of
23 Appeals, will cause them to be compelled to sell their milk at a
24 loss?

25 A As a result of this Court of Appeals decision?

1 Q Yes.

2 A No, In fact, it is my contention -- and I think
3 this would be substantiated -- that most nearby dairy farmers
4 are not desirous of exacting this penalty from their fellow
5 dairy farmers. It is not necessary in any other area of the
6 country.

7 This particular differential, like all others of its
8 type, has been brought about really through the inconsistence
9 of a very limited group and it has been perpetuated in the same
10 manner.

11 Q Is it true then -- and what I am trying to get
12 at is the actual effect. Is there any one group that contends
13 that by reason of this order they will be compelled to produce
14 and sell, market -- sell milk at a substantial loss?

15 A Not under our view of the case except for the
16 fact that the record shows that shortly after the consolidation
17 of these orders in which the Boston, Southeastern New England,
18 the Worcester, Springfield orders were consolidated previously,
19 those nearby producers could only obtain this particular differ-
20 ential by delivering to that particular market that they were
21 associated with.

22 After the ---

23 Q Which group do you represent then?

24 A Well, we represent by a class action order that
25 was contested in the District Court we represent distant producers

1 Q Just producers.

2 A Approximately 6500 dairy farmers, and ---

3 Q And there is no claim on your part, as I under-
4 stand it, that whether this Court of Appeals order stands or
5 not, your clients will actually have to sell milk at less than
6 it costs them to produce it?

7 A Not at less than it costs to produce, no. How-
8 ever, it is ---

9 Q It is only the profit that is involved?

10 A Well, ---

11 Q The division of profits? You understand that to
12 be true?

13 A That is my understanding. However, I will say
14 this, that the margin of profit is something that varies amongst
15 various producers.

16 Q Undoubtedly that would have to be so.

17 A And it does affect some more than it does others.
18 For instance, when this order was consolidated in 1964 so that
19 a producer did not have to have any historical association with
20 any particular market, he could receive -- the nearby producer
21 could receive a differential irrespective of where his milk was
22 delivered.

23 Then we find that approximately that within one year
24 at least 1,000 distant dairy farmers were forced out of business
25 by this particular differential. Now we do make that claim and

1 we think it is substantiated. Now I would like to mention
2 what we regard the congressional program to be here.

3 Q Well, would you -- at least I don't think you did
4 -- explaining how this came about? You said it represents the
5 views of only a very limited group of people?

6 A Yes, I was coming to that, Mr. Justice White.

7 Q Well, it also represents the views of the Secre-
8 tary of Agriculture.

9 A No, it represents the view of the Secretary of
10 Agriculture only to the extent that it has been included in
11 these two orders out of about 75 in the United States.

12 Q But he has -- hasn't he rather recently reaffirmed
13 his view?

14 A His actual finding in 1964 was that the differ-
15 ential was not resulting in such disorderly conditions as would
16 warrant its deletion at this time.

17 Now we don't think that is a proper finding, No. 1,
18 under the Act he is definitely obligated to find that not only
19 the order, but every provision of the order will tend to effectuate
20 the policy of the Act.

21 Q Because, as I understand it, the basic question
22 there is one of power, whether or not he has power, not what you
23 seem to now be addressing yourself to -- that he does have power,
24 but that he exercised it mistakenly or by the wrong standards.

25 A What I am saying there is he also failed to make

1 the proper finding, even assuming that he had this power. But
2 we are saying that he definitely does not have this power, ---

3 Q That is what the Court of Appeals has said, as I
4 understand it, that he has not the power to ---

5 A That is correct, that a more basic violation of
6 the Act would not be comprehended. It is our contention that
7 initially the Agricultural Adjustment Act was passed for the
8 simple reason that all dairy farmers were receiving very low
9 prices for their milk.

10 The fact that some dairy farmers had received higher
11 prices than others in the 1920's has no real relevancy here.
12 The fact is that the private sector of the milk industry, the
13 cooperatives and so forth, there were varying prices that con-
14 tributed to the market instability here and it resulted eventually
15 in all receiving low prices for their milk below the production
16 costs in the 1929 to 1933 period.

17 And consequently because of the fact that the state,
18 as this Court held, in Baldwin versus Sealy could not regulate
19 the price of milk when it moved across interstate lines.

20 The Congress was forced to meet this problem by the
21 enactment of the Agricultural Adjustment Act in 1933. That pro-
22 vided primarily for solving the problem through marketing agree-
23 ments and supplementing licenses. The licenses and the marketing
24 agreements were at that time relegated solely to the prevention
25 of unfair trade practices and the Act was very vague and

1 nebulous.

2 As a result, many different features were included
3 within these licenses that were of doubtful legality and defi-
4 nitely against public policy. As a result the handlers actually
5 refused to comply with the different provisions of these licen-
6 ses, as did the producers, and this compounded the situation.

7 In fact, Congress was well aware from different
8 reports from the Federal Trade Commission that the situation was
9 such that the Act would have to be amended if it was going to
10 be made workable. And in 1935 they did so amend the Act so
11 extensively that it is referred to as the 1935 Act, which this
12 Court has also characterized as such in some of its decisions.

13 That particular 1935 Act did away with the licenses
14 and it included a provision whereby the Secretary was author-
15 ized to issue milk marketing orders. But the Congress was very
16 definite in stating that these orders could contain the enumer-
17 ated terms and conditions and no others. The Secretary, of
18 course, had discretion concerning which terms to include in
19 these particular orders, but he, of course, cannot amend the
20 Act or repeal it by including within it various provisions with-
21 out any statutory basis.

22 As the petitioners have indicated, the primary problem
23 involved here in this milk industry is not only that milk is per-
24 ishable, but also there is a surplus of milk, a necessary surplus
25 even in the short production production season of the year,

1 approximately 20 percent.

2 This, of course, results in a much larger surplus
3 during the flush production season of the year and this is a
4 necessary surplus and the Secretary has found as recently as
5 1957 that without regulation, we find that the level of prices
6 for all producers would be below the cost of production.

7 Regulation of ---

8 Q What is that necessary to apply in the lowest
9 production period?

10 A There are -- although the demand for milk is
11 fairly constant, there are daily fluctuations. For instance,
12 during the summer months you have various areas of the country
13 that are resort areas. They have an influx of population.

14 Q That is a high production period.

15 A Well, not always. You have in Vermont, for
16 instance, the skiing in that area.

17 Q Well, in other words, you have the peak period
18 and you have to --

19 A And this is, of course -- there is no dispute as
20 to this. It is in the record that you do have to maintain the
21 necessary reserve in order to protect the consumer by an ade-
22 quate milk supply.

23 It is the contention of the respondents here that the
24 Congress was motivated to solve this problem by apportioning
25 the burdens of surplus along with the benefits of the Class 1

1 or fluid milk price through the issuance of a program that called
2 for a uniform price to all dairy farmers irrespective of the
3 use of their particular milk.

4 Now, of course, this was the big problem, that some
5 dealers had a fluid milk outlet for their milk. Producers that
6 were selling to that particular handler or dealer were sometimes
7 able to obtain a higher price than other dairy farmers and other
8 handlers who were not able to sell in the fluid milk market.

9 And although the petitioners here cite the case of Rock Royal as
10 authority for this differential, we contend that it is clearly
11 just the opposite.

12 Rock Royal -- actually there were no producers before
13 the Court. It was a case that involved solely handlers and it
14 was shortly after the passage of the 1937 Act. The handlers
15 contended that it violated their constitutional rights to
16 require them to pay a part of the monies that they had obtained
17 from the Class 1 sales into the marketwide pool or producer
18 settlement fund in order that these monies would be paid over
19 to other handlers who had low fluid sales. Most of their milk
20 was disposed of for manufacturing purposes.

21 But it is obvious that the congressional plan could not
22 work unless there was a provision of this nature and also the
23 Congress did not provide for any great unusual situation here.
24 They provided for minimum milk prices that the handler was obli-
25 gated to pay for milk.

1 The Court in Rock Royal held that it was not a viola-
2 tion of due process or the taking of the handlers' property
3 to require him to pay the excess of his fluid sales over the
4 marketwide average into the producers settlement fund for dis-
5 tribution to other handlers who, in turn, would pay these monies
6 to their own producers.

7 Now it is very evident that if a handler could not
8 retain these monies over the marketwide blend price and pay them
9 to his producer, and was obligated to pay this into the fund,
10 that a dairy farmer that served that particular handler certainly
11 could not make the same claim that this could be accomplished
12 indirectly through a nearby differential.

13 We contend that the words "irrespective of use" simply
14 mean that a dairy farmer is entitled to the payment of a uni-
15 form price irrespective of the use of his milk and in every case
16 in which this Court has considered the milk, they have indicated
17 that this is the interpretation of the congressional language.

18 Now the intentions of the petitioners would actually
19 nullify the Act if they were to delete that language and simply
20 say that this means that you can pay a dairy farmer on the basis
21 of use of this milk. This is clearly just the opposite of what
22 the Congress intended should be done.

23 Now the petitioners acknowledge in the Blair case that
24 the adjustments to the uniform price in that case involved a loca-
25 tion differential. Now a location differential really is nothing

1 more than a differential that is allowed for the transportation
2 element that enters into the price of milk, milk that is delivered
3 to one part of the milkshed naturally has to be delivered to
4 the primary consumption center. These are the large cities and
5 the dairy farmer does have to pay for those transportation costs.

6 We make no objection in that regard even though that
7 does detract from our milk price.

8 Q Do you think that is supported -- that that view
9 is supported by the Senate reports?

10 A In our brief we have outlined the reports of
11 both the House and the Senate in great detail and it quotes the
12 language of the reports where the report does say that that
13 location differential is for transportation purposes, from the
14 plants where the milk is delivered to the principal consumption
15 center. And you have to have the system whereby you set up
16 zones and fix a particular transportation charge for each zone
17 as related to the principal consumption center, because this is
18 where the milk is going. This is where it is produced, and of
19 course the Court in Blair held that this was not a proper differ-
20 ential to justify the one that was in the New York order, which
21 was very similar to the one that is in this order, and that
22 related strictly to transportation.

23 Now if the petitioners -- I don't understand whether
24 they maintain that that is a proper differential that would sup-
25 port location differential that would support the nearby

1 differential in this case, but they seem to be limiting their
2 argument at the present time that it is a market differential.

3 Now the reports clearly state that a market differ-
4 ential is a differential that is paid to a dairy farmer for
5 delivering its milk to a city market rather than to a plant,
6 because in a country plant there are double handling costs
7 involved and the measure of this particular market differential
8 is normally the difference between the receiving costs at the
9 country plant and that at the city plant. And the dairy farmers
10 paid that particular differential because they actually perform
11 a service there and they accomplish a reduction in the cost of
12 the handler that maintains the various country plants.

13 The Congress, if the reports are examined, both the
14 House and Senate reports, show that they gave great considera-
15 tion to this particular 1935 Act because of the recent Schechter
16 case and the case of Panama versus Ryan, the other particular
17 case that dealt with delegation of powers.

18 It was very careful to spell out in complete detail
19 what provisions the Secretary could include in his milk orders
20 and we contend that there is no possible basis for saying that
21 there is any statutory justification for the nearby differen-
22 tial, when that particular differential is not even mentioned
23 either in the Act or in any of the reports.

24 Now the Act provides for a volume market production
25 differential and our understanding of the petitioner's contention

1 is that the market differential is simply illustrative in
2 nature. Now if this was true, there would be no point in the
3 Congress specifying the volume differential, the production dif-
4 ferential, the butterfat differential, quality differential,
5 the location differential. They could simply have said all
6 customary market differentials, that this was what they meant
7 by "market differential."

8 But it was not, and this is clearly reflected in the
9 reports. Incidentally, the nearby producer can deliver his
10 milk to a country plant and still receive this nearby differ-
11 ential whereas the distant producer can deliver his milk right
12 to the market center and he does not receive this differential.
13 In fact, he has to pay the nearby producer this particular dif-
14 ferential out of his milk price.

15 So it is exactly the opposite of what the Congress has
16 defined the market differential to be, one for delivery to the
17 city market.

18 Also the only exception to the uniform price that is
19 authorized by the Act is one which is provided for in Section
20 8c(5)(d) pertaining to new producers. The Congress was concerned
21 that handlers were bringing milk into various markets and beating
22 down local prices within that regional market. But it was also
23 concerned that it wanted to make sure that new producers would
24 be given reasonable opportunities to enter markets. In other
25 words, that these would not be closed markets.

1 Consequently, provision 8c(5)(d) provides that a new
2 producer is to receive the same price as any other producer after
3 he serves a particular market for two months. The two months'
4 probationary period is obviously for the purpose of assuring that
5 he is going to regularly supply that market. During that period
6 he is the lowest price use classification of price -- during
7 that particular two months.

8 And this is to assure that he will not market his
9 milk in a particular region only when it is a opportune time
10 for him to do so.

11 Now under the particular 8c(5)(d) pertaining to new
12 producers, it specifically states that that lowest use price
13 that he is to receive during those two months is subject to all
14 other adjustments authorized under the Act. For instance, he
15 would receive the butterfat differential. He would be subject
16 to the transportation differential. He would be subject to the
17 market differential, direct delivery of milk.

18 But under the Act he would also, if this nearby differ-
19 ential is a valid differential, be subject to the nearby differ-
20 tial. And this would result in a new producer whom the Act
21 requires to receive the lowest possible price during the first
22 two months of his delivery because of the fact that he has never
23 supplied this market. He would receive a differential under this
24 nearby differential provision which would pay him because of the
25 fluid use of his milk on a historical basis, even though he had

1 never supplied the market.

2 Now this is a double inconsistency that cannot be
3 attributed to the Congress. This is an inconsistency that is
4 particularly applicable only to the Secretary and even if he
5 didn't pay this nearby differential to these new producers,
6 this simply could not be explained away by a second violation,
7 because the Act requires that all of the adjustments be taken
8 into account even in respect to these new producers.

9 Q Mr. Ryan, earlier in your argument you told us
10 that there are now only two marketing orders that contain these
11 nearby differentials, this one and the one governing the Con-
12 necticut market. And of course I understand that it is your posi-
13 tion none should have them because the Secretary has no power --

14 A Yes, sir.

15 Q --- to propose them. But that is the one side.
16 What is the reason from the Secretary's point of view, the reason
17 why other milk marketing order do not contain these differen-
18 tials?

19 A Well, he has not given a reason for other markets.
20 He has said in respect to Massachusetts, Rhode Island and Connecti-
21 cut producers that historically dairy farmers in the States of
22 Massachusetts, Rhode Island and Connecticut, because of their
23 location with reference to the large population concentrations
24 of New England, have disposed of a substantially larger percent-
25 age of their production for fluid use than have dairy farmers in
the up-country area.

1 Hence, nearby producers have been able to realize a
2 price higher in relation to more distant producers can be
3 accounted for by the advantages of the transportation to market.

4 Under marketwide pooling herein proposed and without
5 some adjustment mechanisms, the nearby producer notwithstanding
6 would be paid on the basis of average utilization of all the
7 milk in the milkshed rather than according to the utilization
8 of his milk.

9 Now this is a direct admission of a violation of the
10 Act, because the Act specifically states that no dairy farmer
11 is to be paid on the basis of the use of his milk. He is to be
12 paid a uniform price irrespective of the use of his milk.

13 The Secretary also found that under a regulated market
14 the nearby producer also obtains the protection of the Federal
15 regulatory program and receives in many instances a higher price
16 than he would otherwise receive. So we come to a situation where
17 prior to Federal regulation all dairy farmers were receiving
18 low prices and even prior to the 1964 Act, much of the local-
19 produced milk had been disposed of for manufacturing or surplus
20 purposes and it is just not an accuracy to say that nearby pro-
21 ducers consistently supply the fluid milk market.

22 In fact, as recently as 1946 the Secretary had to
23 amend the Boston order because of the fact that the nearby pro-
24 ducers were supplying milk to the country plants and were receiv-
25 ing actually a higher price than what they were entitled to at

1 those particular plants.

2 Now we also feel that this Court specifically stated
3 in Rock Royal that any variance between uniform prices would
4 result in a discrimination and would actually cause certain pro-
5 ducers to bear an unfair burden of the surplus market, and this
6 is exactly what the nearby differential does. It reserves the
7 fluid milk market for a larger percentage of it to nearby pro-
8 ducers and it casts on other producers who regularly supply the
9 market a larger share of the burden surplus.

10 Now the Secretary has also admitted that nearby milk
11 has no inherent value that should be compensated for by nearby
12 producers and in his New York decision all of these particular
13 factors were raised in apparent justification for this differ-
14 ential. He rejected all of them. He rejected the factor of
15 inherent value of the nearby milk, he rejected the factor of its
16 availability of its accessibility. He rejected the factor of
17 so-called increased production costs. He rejected everything
18 except the fact that he thought they should be paid on the
19 basis of the historical use of their milk.

20 And of course this is a direct violation of the Act.

21 Now also in the Hood case decided on the very same day
22 that the Rock Royal case was decided, the Court also stated in
23 that case that the producers that intervened in that case were
24 not entitled to maintain a historical price under this particula-
25 Act. The lower court had stated that the only right to a

1 historical price, higher price, that producers had depended upon
2 the constitutionality of this Act, and that they were entitled
3 only to a blend price or a uniform price and we feel that the
4 Hood case is a direct authority for our position here that
5 historical prices are not the criterion for insertion into a
6 milk order, that the criterion is uniform prices rather than
7 varying historical prices.

8 The petitioners have also indicated that there is
9 some question as to the record in this case. Actually the case
10 in the New York-New Jersey milk order was also heard on motions
11 for summary judgment. I don't know of any milk case that
12 hasn't been heard on excerpts from the record.

13 Now when they say "excerpts from the record," they
14 imply that there is some deficiency here, but there is no
15 deficiency in the Blair case. There was a 15,000-page record
16 with hundreds of exhibits. It was necessary to excerpt the
17 relevant in order that the Court could actually comprehend the
18 problem.

19 The same thing occurred in this case and every page of
20 the administrative record that was pertinent to the issue was
21 before the District Court. And the nearby producers, although
22 they presently say that they were denied intervention in the
23 District Court, they were afforded every opportunity to present
24 whatever argument that they might desire to in that case.

25 They filed a brief *amicus curiae* through the Commonwealth

1 of Massachusetts in that case and the District Court had every
2 conceivable argument that could be made before it when it ruled
3 that this particular provision was beyond the statutory power
4 of the Secretary.

5 We also contend that this is not only discriminatory,
6 as well as beyond the statutory power of the Secretary, but that
7 it constitutes a trade barrier. In other words, the fact, for
8 instance, in the Connecticut order illustrates this very graphi-
9 cally where you only have 89 to 95 dairy farmers that are able
10 to market their milk on a regular basis in that particular order.

11 Now they have to pay the large share of their milk price
12 even though it benefits the nearby producer by only 2 cents per
13 hundred pounds, and it would be inconceivable to contend that this
14 was meant to reward nearby producers 2 cents per hundredweight
15 rather than to penalize distant producers and to keep distant
16 producers out of this particular market, any market that has
17 this particular penalty provision.

18 If this particular differential was legalized and it
19 spread to other markets, one can readily visualize that it would
20 simply create chaos and disorderly marketing. In fact, the very
21 reason that this particular milk order, the consolidated order,
22 came about was because of the different and varying conditions
23 that these differentials precipitated. They actually commanded
24 to which market the milk would go. It was uneconomical and very
25 unrealistic because the farmer wanted his milk to go to the

1 market where he would get this differential rather than have it
2 go to a market where it could be distributed most economically
3 with the benefit of the consumer and all dairy farmers, so we
4 contend that it is a much more discriminatory and vicious differ-
5 ential than was invalidated in the Blair case.

6 In the Blair case we had a differential where when the
7 fluid milk in the market reached 80 percent total, this particu-
8 lar differential would actually cease to exist. In this par-
9 ticular differential it would have to reach 100 percent before
10 it would cease to exist. In other words, the differential pro-
11 vides that it's 46 cents or such lesser amount as will equal the
12 Class 1 or fluid milk price.

13 This means that when surplus in the market is the
14 greatest, the differential is the greatest, and the nearby pro-
15 ducer can actually increase his production and contribute to
16 this surplus without worrying that he is going to sustain a
17 reduction in this differential.

18 On the other hand, a distant producer, when he increases
19 his production actually increases the amount that he pays under
20 this particular differential. So actually it provides protection
21 to the nearby producer and at the same time it injures the dis-
22 tant producer when he needs this protection the most.

23 Now we don't think there is any possible basis that
24 has been set forth here for remand. The Court has fully con-
25 sidered all of the factors involved in this case and we would

1 also like to mention that the producer association that was
2 mentioned by Mr. Hollman, the New England Milk Producers Asso-
3 ciation, does vote for the farmers on whether a milk order as
4 a whole should be approved, but no dairy farmer has the right
5 to vote on this particular provision of the order.

6 Now this is very crucial when you realize that the
7 New England Milk Producers Association, which is Boston-based,
8 actually attempted to intervene in this suit as a defendant
9 without advising any of their membership of this. It is a
10 matter of record that its counsel fails to consult its membership
11 whenever he proposed his various administrative provisions that
12 will affect their very livelihood.

13 We contend that any attempt at remand here would
14 actually simply cause the respondents to have the attorneys for
15 the nearby producers represent them, because the NEMDA is
16 actually controlled by nearby producers' representative. Now
17 they have a much larger proportion of their membership in the
18 distant areas, but in the particular dairy field that we are
19 examining here today dairy farmers do not take that much inter-
20 est -- I shouldn't say "interest," but they are unable to
21 effectuate changes in these dairy organizations as much as they
22 would like to, particularly when they are not advised as to what
23 is actually going on.

24 So if under any question of remand or any vote, we
25 would find that the New England Milk Producers Association would

1 vote for the great majority of the plaintiffs that have brought
2 this action and that the attorneys for the New England Milk Pro-
3 ducers Association is Mr. Hollman and his associate counsel
4 below.

5 Now we also feel that the Congress specifically
6 intended to prevent this type of thing because there is another
7 type of pooling other than marketwide pooling which is called
8 "individual handler pooling." Under this particular provision,
9 alternative provision of the Act, all dairy farmers serving the
10 same handler have to be also paid a uniform price, but the price
11 does vary amongst the handlers.

12 Now this particular type of pooling, individual hand-
13 ler pooling, is only appropriate in a market where the supply
14 is very short and where there is practical uniformity amongst
15 all handlers, and this type of pooling has been found to be
16 inappropriate for this particular market.

17 But the important thing is that in order to institute
18 the type of pooling that Congress has provided that every pro-
19 ducer should have one vote on that particular issue alone in a
20 separate referendum on that one issue, and in our mind this indi-
21 cates that the Congress was concerned that the associations could
22 sometimes vote in different things that would affect their mem-
23 bership if they had failed to consult with them.

24 The Congress wanted to preclude this type of happening.

25 Also we would like to point out that in respect to

1 summary judgment that the Lehigh Valley case was heard on motion
2 for summary judgment. The New York Guernsey Producers versus
3 Wickard case was heard on motions for summary judgment, and
4 indeed the petitioners here proposed in January, shortly after
5 the institution of this suit, that the case be heard on cross-
6 motions for summary judgment.

7 Now subsequently they withdrew that particular pro-
8 posal, but nevertheless they were desirous of disposing of a
9 suit at that time and nothing was brought up in the District
10 Court that would in any way reflect on the propriety of grant-
11 ing of summary judgment.

12 The record was very voluminous, five large files and
13 the administrative record numbered many hundreds of pages, as
14 is illustrated by the 753-page appendix here before this Court.
15 So every facet of this particular differential was considered
16 and also the Act requires that the Secretary institute only
17 differentials that have been customarily applied by handlers.

18 Now the record, the administrative record, reflects
19 that this differential had never been applied by handlers and
20 this is the reason why the petitioners advert to the contracts
21 of various cooperatives, none of this being a matter of record
22 and in this case or in any other case that I know of. There is
23 no documentary evidence whatsoever to this effect.

24 The fact is that the record shows conclusively that
25 this particularly differential did not exist until August 1,

1 1937, in the Boston order.

2 It could not have been legalized or validated by the
3 Congress because of the fact that the 1937 reenactment occurred
4 on June 3, 1937. This particular differential was instituted
5 subsequent to that time, so there is no actual question of reen-
6 actment even involved in this case.

7 Also they allege that similar differentials existed
8 prior to 1937, however, but actually this is not the case
9 because the similar differentials actually, No. 1, required
10 delivery of the milk to the city market and the nearby differ-
11 ential does not, so we have that distinguishment here between
12 the pre-1937 and the post-1937 differential.

13 Also the similar differentials that they are referring
14 to actually is what was known under the Act as "base ratings."
15 Base rating requires that all dairy farmers receive the same
16 fluid or Class 1 milk price for their base milk, but under the
17 1936 order only the nearby producer received a Class 1 or
18 fluid price for his base milk. Many producers were never even
19 assigned a base.

20 Q What is base milk please?

21 A It means this, that they compute the demands,
22 the normal demands of the market and they divide up the market,
23 the fluid milk market, and assign each producer a base. And
24 the base is a quota that he is supposed to produced, so that
25 particular quota he will receive the fluid milk or Class 1 milk

1 price. Anything that he produces in excess of that he will
2 receive the manufactured or surplus price.

3 Q Why is that?

4 A Now he is free to produce as much milk as he
5 likes, but any milk produced in excess of his base is paid for
6 at the surplus price. Under the Act, and this has been reaffirmed
7 in 1965 in the Food and Agricultural Act, all producers are
8 entitled to receive the fluid or Class 1 price for their base
9 milk. You cannot give that price to the nearby producers and the
10 rest of the surplus to the distant producers, and this is what
11 is referred to as "similar differentials" by the petitioners
12 here.

13 Actually this is an admission of the illegality of
14 the so-called similar differentials, because of the very fact
15 that they are related to use and constitute a violation of the
16 base rating plans of the Act.

17 Now they have mentioned the case of Green Valley
18 Creamery from the First Circuit as being an authority for the
19 promulgation of this particular nearby differential as a market
20 differential. We would just like to point out that in the Green
21 Valley case there were no producers before the Court. That was
22 a handler case for enforcement and involved an entirely differ-
23 ent issue.

24 Moreover, the Court there did not even examine this
25 issue for the very reason that it was not properly before the

1 Court. This was the contention of the Government that handlers
2 could not question disbursements from out of the pool and that
3 therefore when the handlers attempted to raise this argument
4 concerning the nearby differential, the Government's argument
5 was accepted that this particular contention or issue could not
6 be raised by handlers.

7 So we have the Government contending that they have
8 relied on the Green Valley decision when that Court actually
9 accepted its argument that that particular issue concerning the
10 legality of the nearby differential was not even before the
11 Court.

12 Also, the Green Valley Court actually failed to real-
13 ize that the market differential which it said was a valid dif-
14 ferential and which we agreed was already in the order, and
15 it confused the market differential with the nearby differen-
16 tial. The Court in Green Valley thought that there was a bene-
17 fit and a service provided when milk was delivered to the city
18 market and it stated that it was of the impression that nearby
19 producers did deliver their milk to the city market.

20 Now there is no question but what this is a compensable
21 service for value, but this was already in the order and a
22 reading of the Green Valley case will illustrate that that
23 Court did not realize that this particular differential was
24 already in the order and that producers were compensated for
25 delivering their milk to the city market.

1 Q Where does this term "nearby" come from? Is that
2 a term of -- a colloquial term or is a term of art?

3 A Well, when the regulation was first instituted in
4 the Boston milk market, there were a small number of producers
5 nearby the market who formed an association known as the "Nearby
6 Producers Association." Although it was beyond any contradic-
7 tion that all producers were receiving low prices for their milk
8 at that time, they contended that they were entitled to a special
9 price that they were not subject to equalization as required by
10 the Act. And they threatened to become a menace to the enforce-
11 ment of the Act.

12 At that time the Act in this program was in a very
13 fledgling state and they needed the enforcement support of the
14 State of Massachusetts. The State of Massachusetts refused to
15 give this enforcement support unless this particular conces-
16 sion was made to its producers. They were of the view that the
17 producers and the Government at that time that this was a tem-
18 porary concession.

19 But like all concessions, once they are made, it is
20 very difficult to have the individual receiving the particular
21 benefit give it up.

22 Q You don't find that term in any of the marketing
23 orders?

24 A Not to my knowledge. In fact, it is not in the
25 Act, it is not in the reports.

1 Q What concession was given to them, you say,
2 temporarily?

3 A Yes, they claim that they were not required, that
4 they could not be required to equalize their milk production
5 with other dairy farmers and in order to gain the ---

6 Q In order to equalize the price?

7 A Yes. In other words, to come into the blend
8 price, and this was in effect a temporary acknowledgement or
9 concession to them in order to gain the enforcement support of
10 the Massachusetts Milk Control Board. This was found by the
11 lower court to be a fact also. In other words, a case of Whiting
12 Milk Co. -- the United States versus Whiting Milk Co. in the
13 Boston market in the '30's found that as little as 2,000 quarts
14 of milk or one tankload of milk introduced in the Boston market
15 was not subject to regulation or control could affect the entire
16 price of all dairy farmers.

17 Consequently, you had to have control of the intra-
18 state milk and unless the local authorities would enforce that
19 control, you had no way of actually controlling the milk market
20 price of all the dairy farmers. So this was a temporary con-
21 cession in that respect, although it was recognized that it was
22 a deviation from the requirements of the Act.

23 Now, as I indicated, it has grown and the only evi-
24 dence that was introduced during the 1935 hearing -- 1936 hear-
25 ing, was the testimony of one individual who referred to the

1 alleged milk price received by one dairy farmer out of about
2 20,000 that were supplying the market and even that price to
3 one dairy farmer was admittedly subject to correction.

4 The only other evidence that was introduced that would
5 purport to justify this was the prices paid by two handlers,
6 smaller handlers, out of hundreds that were operating in that
7 particular market. So there actually wasn't any real evidential
8 basis for the awarding of this differential. And this is all
9 brought out in the record.

10 These hearings, the pertinent parts of them, are in
11 the appendix.

12 Q Do you mean by that that there was no support
13 to giving a differential to a farmer based on the location of
14 his farm?

15 A No, not at that time because of the fact that all
16 farmers were receiving low prices at that time.

17 Q Yes.

18 A The Assistant Attorney General of Vermont is going
19 to address the last five minutes.

20 Thank you.

21 THE CLERK: You have three minutes.

22 ARGUMENT OF EDWIN H. AMIDON, JR.
23 ASSISTANT ATTORNEY GENERAL OF VERMONT
ON BEHALF OF VERMONT, AS AMICUS CURIAE

24 MR. AMIDON: Mr. Justice Black, may it please the Court:

25 My name is Edwin Amidon and I am Assistant Attorney

1 General of the State of Vermont here representing the State of
2 Vermont and its Attorney General and its Secretary of Agricul-
3 ture, who incidentally are here today.

4 The legal argument has certainly been well covered.
5 I would just like to briefly emphasize some additional aspects
6 of the factual context.

7 Vermont, unlike I think almost any state in the coun-
8 try, is overwhelmingly dependent on the dairy industry, much
9 more so even than Wisconsin. In addition, the overwhelming
10 majority of its dairy production is sold under this order. The
11 Vermont dairy industry, secondly, is in a great deal of trouble
12 right now. It has lost over a thousand producers since 1965.
13 Third, unlike the 1930's when this type of differential was
14 first adopted, the costs of dairy farming in Vermont are now fully
15 as high as they are in South New England -- taxes, labor, feed,
16 equipment, the various things that go into the cost of producing
17 milk.

18 Q Did that cost differential which you implied
19 exists exist a generation ago? Is that part of the differential?

20 A Yes, Your Honor, I think that may have been
21 implicit in the Secretary's order.

22 Q It wasn't represented to be one of the grounds
23 in the Secretary's submission here today.

24 A That is true, Your Honor. I believe that is not
25 to be found in any of the orders, but I think that is is a sub

1 silentio factor, if I may say so.

2 Fourthly, unlike the 1930's, which I think the accessi-
3 bility, the availability, the reliability of non-nearby producers
4 milk is equal now fully to the milk of Southern New England
5 producers and evenness of production, Your Honors, if it for-
6 merly was not compensated, it is now compensated.

7 Fifth, I should say that the Vermont farmers who are
8 the overwhelming majority of the non-nearby producers have fought
9 this nearby differential from the very beginning. They have
10 never acquiesced in it. They have always opposed it and, of
11 course, when it comes to a vote on a milk order, they have to
12 vote for the milk order in order to avoid the chaos of unregu-
13 lated milk markets where they sell most of their milk.

14 If they didn't vote for the order with this nearby
15 differential in it, they would be out of the ballgame anyway,
16 if I may use that slang.

17 Sixth, there has been no record of any disruption of
18 the New York-New Jersey milk market since the decision in Blair.

19 Seventh, and this has already been said, in Vermont
20 we wonder why Vermont should be the only, shall we say, recipi-
21 ent of this nearby differential. We are most of the non-nearby
22 producers and this nearby differential is only found in New Eng-
23 land orders.

24 So finally in conclusion, it is our position that this
25 is not a nearby differential or a farm location differential.

1 It is not an authorized adjustment to the Agricultural Marketing
2 Act of 1937. It is, in fact, -- it constitutes really a de
3 factor tariff which must be paid by Vermont farmers for the
4 privilege of selling milk in Southern New England.

5 Thank you, Your Honors.

6 MR. JUSTICE BLACK: Mr. Friedman?

7 REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN

8 ON BEHALF OF PETITIONER HARDIN

9 MR. FRIEDMAN: Mr. Justice Black and may it please
10 the Court:

11 I have just four brief points I would like to make in
12 rebuttal and each of them really arises in response to a ques-
13 tion of members of the Court.

14 First, Mr. Justice Harlan asked the question of the
15 origin of this phrase "nearby differential." I think that is a
16 colloquial phrase, but the words the Secretary used in his
17 order in 1964 he spoke of it as "farm location differential,"
18 which I think is a more accurate representation.

19 Now Mr. Justice Black asked the question whether any-
20 body would lose as a result of this decision. There was presented
21 in the District Court in opposition to the motion for summary
22 judgments and they are referred to at page 84 of the record,
23 affidavits by some of the nearby farmers, which indicated that
24 if this differential is abandoned, if this differential is
25 struck out, they will in fact not be getting back their total

1 expenses as a result of the blended price they received.

2 Then I would like to refer ---

3 Q Is there any finding on this?

4 A No, there is no finding on this, Mr. Justice.

5 I would like to refer to two questions which Mr.
6 Justice Stewart asked. The first you inquired, Mr. Justice,
7 as to how the cooperatives vote. They do vote as a unit. That
8 is, if there is a division, all the votes are cast in one way.
9 On the other hand, it seems very clear that if this vote must
10 represent the vote of the majority of the members ---

11 Q Of the majority.

12 A That's right. And of course the evidence in this
13 case indicates that when this 1964 order was put to a vote, it
14 was approved by a vote of something like 89 percent of all the
15 farmers in this area.

16 Q But this so-called referendum is a plebiscite on
17 the whole order, take it or leave it?

18 A That's right. Take it or leave it, and this is
19 true of many situations you have to decide whether to do something
20 with the pros and the cons.

21 Now finally I would like to talk just a minute about
22 this point that there are only two other orders in the whole
23 United States that have this provision.

24 Originally a few years ago there were four other orders.
25 The New York-New Jersey order was struck down; an order in Chicago

1 which was subsequently vacated because of the unwillingness of
2 the handlers to accept certain changes; the present order which
3 was struck down; and the Connecticut order which of course is
4 now under litigation before the Court of Appeals of the Second
5 Circuit.

6 These are only four out of 70 orders. It covered
7 roughly 40 percent of all the milk production in the United
8 States and in addition to that, we have something which I think
9 is quite significant. There is testimony in this record at page
10 549 and I would like to refer to it, as to the extent of the
11 whole problem of how these differentials come into being, what
12 their cause is.

13 On 549 there is a statement as follows: "In the State
14 of California, and the State of California is one of the states
15 that has no Federal regulation at all, producers located in
16 nearby Los Angeles distributing plants are able to obtain more
17 favorable contracts and thus a higher price for utilization than
18 producers that are located in the Central Valley or any other
19 place."

20 In other words, even without a milk marketing order at
21 the present time handlers are willing to pay more to farmers who
22 are located near the center of a market than to distant farmers.
23 No coercion, no claim that the distant farmers are required to
24 accept this.

25 This is the normal operation of the market and I think

1 the reason why we don't have more of these provisions in milk
2 markets is it is just the way markets have arisen. Some of the
3 country, smaller areas, haven't had the problem. If they are
4 closer in, you haven't had this kind of competition for the
5 costly market that is characterized in these Eastern markets.

6 Q You would argue, I suppose, if you prevail in
7 this case, that the Secretary could introduce this differential
8 in any marketing order he wished?

9 A Yes, depending on what the circumstances were. If
10 it appeared that prior to the time of the marketing order that
11 they had this existing, I would ---

12 Q That factor would have to exist?

13 A Well, I am not sure about that. If, for example,
14 the Secretary found -- yes, it would have to exist, Mr. Justice.
15 I retract my statement. It would have to exist, because the
16 statute speaks of market differentials customarily applied.

17 Q That would mean customarily in that marketing
18 area?

19 A Yes, in that marketing area.

20 Thank you.

21 (Whereupon, at 2:15 p.m. the argument in the above-
22 entitled matter was concluded.)

23

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