1940

1. LOCKER PLANT—OPERATOR WHO ACCEPTS FOOD FOR STORAGE BY CUSTOMERS WHO OWN FOOD AND INTEND IT FOR RESALE THROUGH TRADE CHANNELS SHOULD BE LICENSED—SECTIONS 1155-21, 1155-22 G. C.

2. OPERATOR OF LOCKER PLANT WHO OWNS FOOD HELD IN STORAGE IN HIS OWN PLANT FOR SALE TO PUBLIC IS REQUIRED TO COMPLY WITH PROVISIONS OF SECTION 1155-12 G. C.—EXEMPT FROM PROVISIONS OF SECTION 1155-11 G. C.

3. RETAIL DEALER — PURCHASED FRESH FOOD PRODUCTS TO BE SHARP FROZEN—LATER CARRIED PRODUCTS IN REFRIGERATED CABINETS FOR RETAIL SALE—NOT SUBJECT TO PROVISIONS OF SECTIONS 1155-1 TO 1155-29 G. C.—PRODUCTS STORED IN EXCESS OF THIRTY DAYS—OCCASIONAL OR CASUAL—NOT A PLANNED COURSE OF BUSINESS.

SYLLABUS:

1. An operator of a locker plant who accepts for storage by customers food owned by such customers and intended by them for resale through trade channels should be licensed under the provisions of Sections 1155-21 and 1155-22, General Code.

2. The operator of a locker plant with respect to food owned by him and held in storage in his own plant for sale to the public is required to comply with the provisions of Section 1155-12 but is exempt from the provisions of Section 1155-11, General Code.

3. A retail dealer who purchases fresh food products and causes them to be "sharp frozen" and who thereafter carries such products in refrigerated cabinets for retail sale to the public is not subject to the provisions of Sections 1155-1 to 1155-29, both inclusive, General Code, notwithstanding the fact that he may so store such products for periods in excess of thirty days only occasionally or casually and due to the exigencies of his business and not in a planned course of business.

Columbus, Ohio, June 23, 1950

Hon. H. S. Foust, Director, Department of Agriculture
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"We are requesting your opinion to clarify certain sections of the frozen food locker plant laws so that they may be properly enforced.

Section 1155-2, General Code of Ohio, defines a cold storage warehouse as a place artificially cooled in which articles of food are stored, for thirty days or more, at a temperature of forty degrees Fahrenheit, or lower, and Section 1155-7, General Code, provides for the licensing of such plants.

Section 1155-20, General Code, as amended by the last General Assembly, defines a locker plant as an establishment operated independently or in connection with another business, having a chill room; facilities for cutting, preparing, wrapping and packaging of meats and meat products, fruits and vegetables in preparation for sharp freezing; facilities for sharp freezing and a locker room. It also defines a locker room as a room operated as a part of a locker plant in which lockers are located and in which space may be provided for the storage of food belonging to and for sale by the operator to the public. Sections 1155-21 and 1155-22 provide for the licensing of such plants.

Should a frozen food locker plant, storing food other than that belonging to the operator, in a locker room (such food being for sale or overflow from the individual lockers) or in individual lockers (if the food is for trade channels) be licensed under Sections 1155-21 and 1155-22 or should it be licensed under Section 1155-7 of the cold storage warehouse act?

Section 1155-26(d) provides that articles of food intended for trade channels must be handled as provided under Sections 1155-9, 1155-11 and 1155-12 of the General Code, but it also provides that an operator may have in storage in any locker plant, food belonging to and for sale by such operator without complying with the provisions of Sections 1155-9 and 1155-11.

When cold storage food belonging to the operator is offered for sale it is required to be stamped with the words 'Wholesale Cold Storage Food' and marked with the date when it is withdrawn from storage, as provided by Section 1155-12, even though Section 1155-26(d) provides that the operator may have

food belonging to and for sale by him without complying with the provisions of Section 1155-11, which requires the date of deposit and date of withdrawal be stamped on cold storage foods? Does Section 1155-26(d) supersede Section 1155-12, because it is a later amendment to the law?

If the operator is required to comply with Section 1155-12, with respect to food owned by such operator, is he also required to comply with Section 1155-11, providing for the marking of food with the date of deposit and withdrawal, for without such a record there would be no way to determine if the products had been held in cold storage beyond the statutory limit of 12 months, as provided in Section 1155-13, General Code? Do the amendments to the frozen food locker laws permit the operator privileges, which are not granted customers, who store foods for sale later?

What is the status of food purchased as a fresh product, sharp frozen and carried in zero cabinets for retail sale to the public, which may have been held more than thirty days?"

In considering your inquiry it may be helpful to summarize the specific questions which I understand you to present as follows:

1. Should the operator of a locker plant, who accepts for storage for customers food owned by them and intended for resale by them through trade channels, be licensed under Section 1155-7 or under Sections 1155-21 and 1155-22, General Code?

2. Is the operator of a locker plant with respect to food owned by him and held in his plant for sale to the public required to comply with the provisions of Sections 1155-12 and 1155-11, General Code?

3. Is a retail dealer who purchases fresh products, causes them to be "sharp frozen" and thereafter carried in refrigerated cabinets for retail sale to the public, subject to any of the provisions of Sections 1155-1 to 1155-28, both inclusive, General Code, by reason of the fact that he may hold such products in such storage for periods exceeding thirty days?

It is appropriate, I think, to invite attention initially to the fact, as pointed out in an opinion by my predecessor, Opinion No. 4263, dated January 8, 1949, that the statutes with which we are here concerned consist of two distinct acts of the legislature. The first such act was House Bill No. 83, which was approved March 30, 1917, and consisted of Sections 1155-1 to 1155-19, both inclusive, General Code. This act was entitled "An Act providing for the inspection of cold storage goods

and the regulation and supervision of cold storage warehouses." The second act was House Bill No. 206, approved May 14, 1943 and consisted of Sections 1155-20 to 1155-28, both inclusive, General Code. This act was entitled "An Act to regulate the operation of plants for the cold storage of food in individual lockers."

In 1949 this latter act was amended by House Bill No. 608, effective October 25, 1949, in which the definition of "locker plants" was materially changed and which made effective also revised requirements for keeping of records by operators of locker plants.

The history of this legislation, the definitions found in Sections 1155-2 and 1155-20, General Code, and the facilities required to be maintained by locker plant operators under the provisions of Section 1155-24, General Code, indicate rather clearly that it is the intention of the legislature to regulate two distinctly different kinds of business operations, namely cold storage warehouses and locker plants.

Prior to August 14, 1943, of course, this was not true. The act then in effect by virtue of the definition of a cold storage warehouse was found in Section 1155-2, General Code, clearly included those establishments which are now classified as locker plants. This was recognized by one of my predecessors in Opinion No. 4605, dated December 19, 1941, in which it was held that locker plants were required to be licensed but that Sections 1155-9, 1155-10 and 1155-11, General Code, were not applicable to them. This ruling was based on that exemption in Section 1155-11, General Code, relating to the storage of food by consumers for their own use.

Following the enactment of Sections 1155-20 to 1155-29, both inclusive, General Code, effective August 14, 1943, the legislature recognized the "locker plant" as an establishment distinct from a cold storage warehouse and required it to be licensed under the new act. The chief distinctions between these two establishments seem to have been first, the difference in temperature required to be maintained and, second, the ownership of the food being stored. Thus, while the cold storage warehouse was required to maintain temperatures of 40° Fahrenheit or lower, the locker plant was required to maintain facilities to include a chill room at 38° Fahrenheit more or less, a sharp freeze room at a temperature not to exceed zero minus 10° Fahrenheit, and a locker room at a temperature not to exceed 5° Fahrenheit.

It was contemplated, I think, that the cold storage warehouse would ordinarily accept food for storage from persons who held it for sale to the public, whereas the operation of the locker plant was restricted to the storage of food in individual lockers for consumers who intended it for their own use.

Following the enactment of House Bill No. 608 on October 29, 1949, the definition of "locker plant" was restricted in one extent and expanded in another. Thus, this term was deemed to include only those establishments having certain named facilities for the preparation of food for storage as well as locker rooms for such storage. See Section 1155-20, General Code. At the same time locker plant operators were authorized to engage in two additional modes of operation, namely the storage of food for persons holding it for sale in trade channels and the storage of food owned by the locker plant operator himself and held by him for sale.

With these distinctions in mind we come to the first question presented, whether operators of locker plants should be licensed under Section 1155-2, General Code, because of the fact that they store food other than that belonging to the operator in a locker room (such food being for sale or overflow from the individual lockers) or in individual lockers (if the food is for trade channels).

Section 1155-26, General Code, clearly authorizes the operator of a locker plant to (1) store food owned by him and held by him for sale in a locker room owned by him, and (2) to accept for storage in individual lockers food owned by persons holding it for sale in trade channels. While no mention is made in the statute of the practice of storing overflow from individual lockers in the "locker room" as distinguished from "individual lockers", I assume that the "overflow from individual lockers" which you mention is a temporary arrangement which is not followed in the regular course of business.

For this reason and in view of the specific authority found in Section 1155-26, General Code, I have no difficulty in concluding that such locker plant operators should be licensed under the provisions of Sections 1155-21 and 1155-22, General Code, rather than under Section 1155-7. Nor do I think a temporary measure undertaken to provide for "overflow from individual lockers", if not followed as a regular business practice for the purpose of expanding individual locker capacity, would be considered

sufficient to require the operator to be licensed under Section 1155-7, General Code.

Coming now to the second question presented, I think the answer would be found in the express provisions of Paragraph (d) of Section 1155-26, General Code. This paragraph clearly requires that all articles of food intended for trade channels must be handled as provided under Sections 1155-9, 1155-11 and 1155-12 of the General Code. I think it is obvious that food owned by an operator of a locker plant which is stored by him in his own plant for sale to the public must be classed as "articles of food which are intended for trade channels." Accordingly, such operator with respect to such food so stored by him would be required to comply with all three of the sections listed above were it not for the proviso in paragraph (d) Section 1155-26, General Code, which exempts him from compliance with Sections 1155-9 and 1155-11, General Code.

For this reason I think there is no doubt but that he is exempt from compliance with Sections 1155-9 and 1155-11, General Code, and that it is equally clear that he is required to comply with the provisions of Section 1155-12. In other words, it cannot be said that the legislature by making such operators subject to Section 1155-12, General Code, intended by implication that he should be subject to the provisions of Section 1155-11 also, when there is an express provision in the statute exempting him from compliance with the latter section.

This situation does, as you suggest, make a distinction between the methods of handling the storage of food for customers of the locker plant operator and the methods which may be followed by the locker plant operator himself in the storage of food owned by him. While the reason for such distinction may not be readily apparent, I do not think it can be said to be one which the legislature is not authorized to make.

As to your final question on the status of retail dealers who may hold food for sale in zero cabinets in excess of thirty days, I think the application of the provisions of Section 1155-20, et seq., General Code, to them is one of fact to be determined in each case. The rule to be followed in such cases is that if holding of food for storage for thirty days or longer is done in repeated and successive transactions in the regular and usual course of business, then the dealers would be subject to the provisions of this legislation. If, however, such dealer should store food

in excess of thirty days only occasionally or casually and due to unforeseen exigencies and not as a planned course of business, then he should not be considered as a locker plant operator.

In this connection it seems to be the policy of the legislature, in laws which impose taxes on certain business transactions or which regulate certain businesses, to exempt isolated and casual cases which might otherwise technically be controlled by the statute concerned. Thus, in the sales tax law we find an exemption in the case of "casual and isolated sales" in Section 5546-2, paragraph 7, General Code. In like manner casual sales of securities not in the course of repeated and excessive transactions are excepted under the provisions of Section 8624-4, General Code.

The courts likewise recognize this policy in holding that "no single act constitutes the transaction of business" under the Ohio Foreign Corporation Act. See Maryland Casualty Company v. Explosive Sales Company, 14 O. L. A. 491.

In view of the foregoing and in specific answer to your questions it is my opinion that:

1. An operator of a locker plant who accepts for storage by customers food owned by such customers and intended by them for resale through trade channels should be licensed under the provisions of Sections 1155-21 and 1155-22, General Code.

2. The operator of a locker plant with respect to food owned by him and held in storage in his own plant for sale to the public is required to comply with the provisions of Section 1155-12 but is exempt from the provisions of Section 1155-11, General Code.

3. A retail dealer who purchases fresh food products and causes them to be "sharp frozen" and who thereafter carries such products in refrigerated cabinets for retail sale to the public is not subject to the provisions of Sections 1155-1 to 1155-29, both inclusive, General Code, notwithstanding the fact that he may so store such products for periods in excess of thirty days only occasionally or casually and due to the exigencies of his business and not in a planned course of business.

Respectfully,

HERBERT S. DUFFY,
Attorney General.