

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1939

ENROLLED

SENATE BILL No. 134

(By Mr. Allen)

PASSED March 9th 1939

In Effect Thirty days Passage



ENROLLED
Senate Bill No. 134

(BY MR. ALLEN, by request)

[Passed March 9, 1939; in effect ninety days from passage.]

AN ACT relating to unfair methods of competition; making certain unfair trade practices unlawful; defining the duties of clerks of courts and of the attorney general in regard thereto; declaring certain contracts illegal and forbidding recovery thereon; providing for injunction proceedings to restrain a continuance of acts in violation of the provisions hereof and providing for the recovery of damages; vesting circuit courts with jurisdiction to order the forfeiture of charters, rights, franchises and privileges of corporations or joint stock companies violating the provisions of this act; making the violation of the provisions of this act a misdemeanor and provid-

ing penalties; and fixing a date when the provisions hereof shall be effective.

Be it enacted by the Legislature of West Virginia:

Section 1. The sale of goods at less than the cost thereof results in economic maladjustments and tends toward the creation of monopolies, thereby destroying fair and healthy competition and tending toward bankruptcy among merchants who maintain a fair price policy, and is, therefore, an unfair trade practice. It is hereby declared that any advertisement, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost, as defined in this act, or any advertisement of an intent to give, any offer to give, or gift of any merchandise, either by retailers or wholesalers, for the purposes of unfairly diverting trade from or otherwise injuring competitors and destroying competition, is an unfair method of competition contrary to public policy and in contravention of the policy of this act, which shall be known and designated as the "Unfair Practices Act."

Sec. 2. It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association

3 engaged in business as a retailer or wholesaler within this
4 state, to sell, offer for sale or advertise for sale any article,
5 product or item of merchandise at less than the cost thereof
6 to the vendor, or give, offer to give or advertise the intent
7 to give away any article, product or item of merchandise
8 for the purposes of unfairly diverting trade from or other-
9 wise injuring one or more competitors, and destroying com-
10 petition. Each violation shall constitute a misdemeanor and
11 upon conviction thereof, any person, partnership, firm, cor-
12 poration, joint stock company, or other association violating
13 this section shall be subject to the penalty set out in section
14 eleven hereof.

Sec. 3. The secret payment or allowance of rebates, refunds,
2 commissions, or unearned discounts, whether in the form of
3 money or otherwise, or secretly extending to certain purchas-
4 ers special services or privileges not extended to all purchasers
5 purchasing upon like terms and conditions, to the injury of a
6 competitor and where such payment or allowance tends to de-
7 stroy competition, is an unfair trade practice and any person,
8 partnership, firm, corporation, joint stock company, or other
9 association resorting to such trade practice shall be deemed

10 guilty of a misdemeanor and on conviction thereof shall be
11 subject to the penalties set out in section eleven of this act.

Sec. 4. Any person who, either as director, officer or agent
2 of any firm or corporation or as agent of any person violating
3 the provisions of this act, assists or aids, directly or indirectly,
4 in such violation shall be responsible therefor equally with the
5 person, firm or corporation for whom or for which he acts.

Sec. 5. (a) The term "retailer" shall mean and include
2 every person, partnership, firm, corporation, joint stock com-
3 pany or other association engaged in the business of making
4 sales at retail within this state: *Provided, however,* That in
5 the case of a person, partnership, firm, corporation, joint stock
6 company or other association engaged in the business of mak-
7 ing sales both at retail and at wholesale, such terms shall be
8 applied only to the retail portion of such business.

9 (b) The term "wholesaler" shall mean and include every
10 person, partnership, firm, corporation, joint stock company,
11 or other association engaged in the business of making sales
12 at wholesale within this state; provided that, in the case of
13 a person, partnership, firm, corporation, joint stock company,
14 or other association engaged in the business of making sales

15 both at retail and wholesale, such term shall be applied only
16 to the wholesale portion of such business.

17 (c) The provisions of this act shall be applicable to all
18 sales at retail made by a retailer as herein defined, and shall
19 be applicable to any transfer for a valuable consideration
20 made in the ordinary course of trade or in the usual prose-
21 cution of the retailer's business, of title to tangible personal
22 property to the purchaser for consumption or use other than
23 resale or further proceedings or manufacturing, and shall be
24 applicable also to any transfer of such property where title
25 is retained by the retailer as security for the payment of such
26 purchase price.

27 (d) The provisions of this act shall be applicable to all
28 sales at wholesale, and shall be applicable to any transfer for
29 a valuable consideration made in the ordinary course of trade
30 or in the usual prosecution of the wholesaler's business, of title
31 to tangible personal property to the purchaser for purposes of
32 resale or further proceedings or manufacturing, and shall be
33 applicable also to any such transfer of property where title is
34 retained by the seller as security for the payment of the pur-
35 chase price.

Sec. 6. (a) The term "cost" when applicable to the business of retailer shall mean bona fide cost and shall mean (1) the invoice cost of the article, product or item of merchandise to the retailer or the replacement cost thereof to the retailer within thirty days prior to the date of sale, offer for sale or advertisement for sale, as the case may be, in the quantity last purchased, whichever is lower, from either of which there shall be deducted all trade discounts, except customary discounts for cash, and (2) to either of which there shall be added the following items of expense:

1. Freight charges not otherwise included in the cost of the article, product or item of merchandise, but which freight charges shall not be construed as including cartage to retail outlet if done or paid for by the retailer.

2. A mark-up to cover, in part, the cost of doing business, which mark-up, in the absence of proof of a lesser cost, shall be seven per-cent of the aggregate of invoice cost or replacement cost (whichever is used), less trade discounts as aforesaid, and plus said freight charges.

(b) The term "cost" when applicable to the business of a wholesaler shall mean bona fide cost and shall mean (1)

22 the invoice cost of the merchandise to the wholesaler, or the
23 replacement cost of the merchandise to the wholesaler within
24 thirty days prior to the date of sale, offer for sale or advertisement for sale, as the case may be, in the quantity last
25 purchased, whichever is lower, from either of which there
26 shall be deducted all trade discounts except customary discounts for cash and (2) to either of which there shall be
27 added the following items of expense:

30 1. Freight charges not otherwise included in the cost of
31 the article, product or item of merchandise, but which freight
32 charges shall not be construed as including cartage to the
33 retail outlet if done or paid for by the wholesaler.

34 2. A mark-up to cover, in part, the cost of doing business,
35 which mark-up in the absence of proof of a lesser cost, shall
36 be two per-cent of the aggregate of invoice cost or replacement cost (whichever is used), less trade discounts as aforesaid, and plus said freight charges.

Sec. 7. In establishing the "cost" of a given article, product or item of merchandise to the vendor, the invoice cost of
2 any article, product or item of merchandise purchased at a
3 forced, bankrupt, closeout sale, or other sale outside of the

5 ordinary channels of trade may not be used as a basis for
6 justifying a price lower than one based upon the replace-
7 ment cost as of the date of said sale of said article, product
8 or item of merchandise replaced through the ordinary chan-
9 nels of trade, unless said article, product or merchandise is
10 kept separate from goods purchased in the ordinary chan-
11 nels of trade and unless said article, product or item of
12 merchandise is advertised and sold as merchandise pur-
13 chased at a forced, bankrupt, closeout sale, or by means other
14 than through the ordinary channels of trade, and said ad-
15 vertising shall state the conditions under which said goods
16 were so purchased, and the quantity of such merchandise to
17 be sold or offered for sale.

Sec. 8. The provisions of this act shall not apply to any
2 sale made:

3 (a) In closing out in good faith the owner's stock or any
4 part thereof for the purpose of discontinuing his trade in any
5 such stock or commodity, and in the case of the sale of sea-
6 sonal goods or to the bona fide sale of perishable goods to pre-
7 vent loss to the vendor by spoilage or depreciation;

8 (b) When the goods are damaged or deteriorated in qual-

ity or where merchandise is sold in bona fide clearance sales,
and, in each case, merchandise is advertised, marked and sold
as such;

(c) By an officer acting under the orders of any court;

(d) In an endeavor in good faith to meet the legal prices
of a competitor as herein defined selling the same article,
product or item of merchandise, in the same locality or trade
area;

(e) For charitable purposes or to relief agencies;

(f) Where merchandise is sold on contract to depart-
ments of the government or governmental institutions.

Sec. 9. Any person, firm, partnership, corporation, joint
stock company, or trade association may maintain a proceed-
ing to enjoin a continuance of any act or acts in violation of
the provisions of this act and, if injured thereby, for the re-
covery of damages in the circuit court of the county wherein
said act is alleged to have been or is being violated. If, in
such proceeding, the court shall find that the defendant is
violating or has violated any of the provisions of this act, it
shall enjoin such defendant from a continuance thereof. It
shall not be necessary that actual damages to the plaintiff be

11 alleged or proved. In addition to such injunctive relief,
12 the plaintiff in said action shall be entitled to recover from the
13 defendant three times the amount of the actual damages, if
14 any, sustained.

Sec. 10. Whenever any corporation or joint stock company
2 shall be convicted of, or shall be enjoined from violating any
3 of the provisions of this act, it shall be the duty of the clerk
4 of the court wherein said corporation or joint stock company
5 has been convicted or enjoined to certify said conviction or in-
6 junction decree, as the case may be, to the attorney general of
7 this state. Upon the third conviction for the violation of this
8 act by any corporation or joint stock company, or whenever
9 any corporation or joint stock company shall have been en-
10 joined three times from violating this act, it shall be the duty
11 of the attorney general to institute proper suits in any circuit
12 court in this state for the forfeiture of its charter, rights,
13 franchises or privileges and powers exercised by such cor-
14 poration or joint stock company, and to enjoin permanently
15 such violator from transacting business within this state; and
16 if in such suit the court shall find that the party defendant is
17 guilty of violating said act as aforesaid, it shall enjoin said

18 party defendant from doing business in this state, perma-
19 nently or for such time as the court, in its discretion, shall
20 order, and if the order be for permanent injunction against the
21 transaction of business, the court shall order the forfeiture of
22 the charter, rights, franchises or privileges and powers exer-
23 cised by such party defendant.

24 Jurisdiction is hereby vested in the circuit courts of this
25 state to carry into effect the provisions of sections nine and ten
26 hereof.

Sec. 11. Any person, firm, partnership, corporation, joint
2 stock company or other association, whether as principal,
3 agent, officer or director, for himself, or itself, or for another
4 person, or for any person, firm, partnership, corporation,
5 joint stock company or other association, who or which shall
6 violate any of the provisions of this act, is guilty of a mis-
7 demeanor for each single violation and upon conviction there-
8 of shall be punished by a fine of not less than one hundred
9 dollars nor more than one thousand dollars, or by imprison-
10 ment not exceeding ninety days or by both said fine and im-
11 prisonment, in the discretion of the court.

Sec. 12. Any contract, express or implied, made by any

2 person, firm, partnership, corporation, joint stock company
3 or other association, in violation of any of the provisions of
4 this act, is hereby declared to be an illegal contract and no re-
5 covery thereon shall be had.

Sec. 13. If any section, sentence, clause or phrase of this
2 act is for any reason held to be unconstitutional, such decision
3 shall not affect the validity of the remaining portions of the
4 act.

Sec. 14. In any injunction proceeding or in any prosecution
2 for a misdemeanor under the provisions of this act, proof of
3 any advertisement, offer to sell, or sale of any merchandise by
4 a retailer or wholesaler, at less than cost, or any advertise-
5 ment of an intent to give, offer to give, or gift of any mer-
6 chandise by a retailer or wholesaler, or any secret payment,
7 allowance of rebates, refunds, commissions, or unearned dis-
8 counts, whether in the form of money or otherwise, or secretly
9 extending to certain purchasers special services or privileges
10 not extended to all purchasers purchasing upon like terms and
11 conditions, shall be prima facie evidence of a violation of this
12 act, and proof of a violation of this act by any person as of-
13 ficer, director or agent shall be sufficient proof of a violation of

14 this act by the person, firm or corporation for whom or for
15 which he acts.

Sec. 15. The Legislature declares that the purpose of this
2 act is to safeguard the public against the creation or per-
3 petuation of monopolies and to foster and encourage competi-
4 tion, by prohibiting unfair and discriminatory practices by
5 which fair and honest competition is destroyed or prevented.
6 This act shall be liberally construed that its beneficial pur-
7 poses may be subserved.

This is the day of _____ 19____


SECRETARY OF STATE

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

E. D. Wiseman

Chairman Senate Committee

Will M. Walker

Chairman House Committee

Originated in the

Senate

Takes effect

Ninety days passage

Samuel H. Hix

Clerk of the Senate

Geo. S. Hace

Clerk of the House of Delegates

Wm. McKeen

President of the Senate

James K. Thomas

Speaker House of Delegates

I certify that the foregoing ~~act~~,
having been presented to the Governor for
his approval, and not having been returned
by him to the House of the Legislature in
which it originated within the time pre-
scribed by the constitution of the state, has
become a law without his approval.

This the *17* day of *March*

Governor

19*39*

Ann S. O'Brien

SECRETARY OF STATE