WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1961

ENROLLED

HOUSE BILL No. 85

(By Mr. Brotherton)

PASSED:
March 9th, 1961

In Effect:
July 10th, 1961

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JOSEPH F. BURDETT
SECRETARY OF STATE
ENROLLED

House Bill No. 85
(By Mr. Brotherton)

[Passed March 9, 1961; in effect July 1, 1961.]

AN ACT to amend chapter forty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article thirteen, to prevent unfair competition and unfair trade practices in the sale of cigarettes; to prohibit sales of cigarettes below cost; to protect and stabilize the collection of taxes on the sale of cigarettes and revenues from the licensing of persons engaged in the sale of cigarettes; to confer powers and impose duties on the state tax commissioner and on persons, as defined herein, engaged in the sale of cigarettes at retail or wholesale; and providing remedies and imposing penalties for violations thereof.

WHEREAS, The advertising, offering for sale, or sale of cigarettes below cost in the retail or wholesale trade with intent of
injuring competitors or destroying or substantially lessening
competition, is an unfair and deceptive business practice; and

WHEREAS, Such practices adversely affect the collection of
taxes from the sale of cigarettes and license fees imposed on
distributors, wholesalers, retailers and others engaged in the
sale of cigarettes; and

WHEREAS, It is hereby declared to be the policy of this state
to promote the public welfare by prohibiting such sales, and
it is the purpose of this bill to carry out that policy in the
public interest; therefore,

Be it enacted by the Legislature of West Virginia:

That chapter forty-seven of the code of West Virginia, one
thousand nine hundred thirty-one, as amended, be amended by
adding thereto a new article, designated article thirteen, to
read as follows:


Section 1. Title.—This article shall be known, design-
nated and cited as “The Cigarette Sales Act”.

Sec. 2. Definitions.—When used in this article, the fol-
lowing words and phrases shall have the meaning ascribed
to them in this section except where the context clearly
indicates a different meaning:
(1) "Person" shall mean and include any individual, firm, association, company, partnership, corporation, joint stock company, club, agency, syndicate, municipal corporation or other political subdivision of this state, trust, receiver, trustee, fiduciary and conservator.

(2) "Wholesaler" shall include any person who:

(a) Purchases cigarettes directly from the manufacturer; or

(b) Purchases cigarettes from any other person who purchases from the manufacturer and who acquires such cigarettes solely for the purpose of bona fide resale to retail dealers or to other persons for the purposes of resale only; or

(c) Services retail outlets by the maintenance of an established place of business for the purchase of cigarettes, including, but not limited to, the maintenance of warehousing facilities for the storage and distribution of cigarettes.

Nothing contained herein shall prevent a person from qualifying in different capacities as both a "wholesaler" and "retailer" under the applicable provisions of this article.
27 (3) "Retailer" shall mean and include any person who
28 operates a store, stand, booth, concession or vending ma-
29 chine for the purpose of making sales of cigarettes at
30 retail.
31 (4) "Commissioner" shall mean the state tax commis-
32 sioner of the State of West Virginia and where the mean-
33 ing of the context so requires, all deputies and employees
34 duly authorized by him.
35 (5) "Cigarettes" shall mean any roll for smoking made
36 wholly or in part of tobacco, irrespective of size or shape
37 and whether or not such tobacco is flavored, adulterated
38 or mixed with any other ingredient, the wrapper or cover
39 of which is made of paper or any other substance or mate-
40 rial except tobacco.
41 (6) "Sale" shall mean any transfer for consideration,
42 exchange, barter, gift, offer for sale and distribution, in
43 any manner, or by any means whatsoever.
44 (7) "Sell at wholesale", "Sale at wholesale" and
45 "Wholesale sales" shall mean and include any bona fide
46 transfer of title to cigarettes for a valuable consideration,
47 made in the ordinary course of trade or in the usual con-
duct of the wholesaler's business, to a retailer for the purpose of resale.

(8) "Sell at retail", "Sale at retail" and "Retail sales" shall mean and include any transfer of title to cigarettes for a valuable consideration, made in the ordinary course of trade or usual conduct of the seller's business, to the purchaser for consumption or use.

(9) "Basic cost of cigarettes" shall mean the invoice cost of cigarettes to the retailer or wholesaler, as the case may be, or the replacement cost of cigarettes to the retailer or wholesaler, as the case may be in the quantity last purchased, whichever is lower, less all trade discounts, except the customary discounts for cash, to which shall be added the full face value of any stamps which may be required by the cigarette tax act of this state and by ordinance of any municipality thereof, now in effect or hereafter enacted, if not already included by the manufacturer in his list price.

(10) (a) The term "cost to the wholesaler" shall mean the "basic cost of cigarettes" to the wholesaler plus the "cost of doing business by the wholesaler", as evidenced
69 by the standards and methods of accounting regularly
70 employed by him in his allocation of overhead costs and
71 expenses, paid or incurred, and must include, without
72 limitation, labor costs (including salaries of executives
73 and officers), rent, depreciation, selling costs, all types of
74 licenses, taxes, insurance, maintenance of equipment, de-
75 livery costs and advertising.
76 (b) In the absence of the filing with the commissioner
77 of satisfactory proof of a lesser or higher cost of doing
78 business by the wholesaler making the sale, the “cost of
79 doing business by the wholesaler” shall be presumed to
80 be two per centum of the “basic cost of cigarettes” to the
81 wholesaler, plus cartage to the retail outlet, if performed
82 or paid for by the wholesaler, which cartage cost, in the
83 absence of the filing with the commissioner of satisfactory
84 proof of a lesser or higher cost, shall be deemed to be
85 three fourths of one per centum of the “basic cost of
86 cigarettes” to the wholesaler.
87 (11) (a) The term “cost to the retailer” shall mean the
88 “basic cost of cigarettes” to the retailer plus the “cost of
89 doing business by the retailer”, as evidenced by the stand-
ards and methods of accounting regularly employed by him in his allocation of overhead costs and expenses, paid or incurred, and must include, without limitation, labor (including salaries of executives and officers), rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance and advertising: Provided, That any retailer who, in connection with the retailer’s purchase, receives not only the discounts ordinarily allowed upon purchases by a wholesaler but also shall, in determining “costs to the retailer”, pursuant to this sub-section, add the “cost of doing business by the wholesaler”, as defined in section two, subparagraph ten of this article, to the “basic cost of cigarettes” to said retailer, as well as the “cost of doing business by the retailer”.

(b) In the absence of the filing with the commissioner of satisfactory proof of a lesser or higher cost of doing business by the retailer making the sale, the “cost of doing business by the retailer” shall be presumed to be eight per centum of the “basic cost of cigarettes” to the retailer.

(c) In the absence of the filing with the commissioner
of satisfactory proof of a lesser or higher cost of doing business, the "cost of doing business by the retailer", who, in connection with the retailer's purchase, receives not only the discounts ordinarily allowed upon purchases by a retailer but also, in whole or in part, the discounts ordinarily allowed upon purchases by a wholesaler, shall be presumed to be ten per centum of the sum of the "basic cost of cigarettes" and the "cost of doing business by the wholesaler".

(12) "Business day" shall mean any day other than Sunday or a legal holiday.

Sec. 3. Violations and Penalties.—It shall be unlawful and a violation of this article:

(a) For any retailer or wholesaler with intent to injure competitors or destroy or substantially lessen competition:

(1) To advertise, offer to sell, or sell, at retail or wholesale, cigarettes at less than cost to such a retailer or wholesaler, as the case may be.

(2) To offer a rebate in price, to give a rebate in price, to offer a concession of any kind, or give a concession of
any kind or nature whatsoever in connection with the
sale of cigarettes, which, when the amount of such rebate
or value of such concession is deducted from the total
price at which the cigarettes are sold, would have the
result of reducing the price to less than cost to such
retailer or wholesaler.

(b) For any retailer:

(1) To induce or attempt to induce or to procure or
attempt to procure the purchase of cigarettes at a price
less than "cost to wholesaler" as defined in this article.

(2) To induce or attempt to induce or to procure or
attempt to procure any rebate or concession of any kind or
nature whatsoever in connection with the purchase of
cigarettes.

(c) Any retailer or wholesaler who violates the provi-
sions of this section shall be guilty of a misdemeanor and
shall be prosecuted and punished by a fine of not more
than five hundred dollars for each such offense. Any in-
dividual who as a director, officer, partner, member or
agent of any person violating the provisions of this article
assists or aids, directly or indirectly in such violation,
shall, equally with the person for whom he acts, be re-
sponsible therefor and subject to the punishment and
penalties set forth herein.

(d) Evidence of advertisement, offering to sell or sale
of cigarettes by any retailer, or wholesaler at less than cost
to him, or evidence of any offer of a rebate in price or the
giving of a rebate in price or an offer of a concession or
the giving of a concession of any kind or nature what-
soever in connection with the sale of cigarettes or the in-
ducing or attempt to induce or the procuring or the at-
tempt to procure the purchase of cigarettes at a price
less than cost to the wholesaler or the retailer shall be
prima facie evidence of intent to injure competitors and
to destroy or substantially lessen competition.

Sec. 4. Sales from Wholesaler to Wholesaler, and to
Certain Retailers.—When one wholesaler sells cigarettes to
any other wholesaler, the former shall not be required to
include in his selling price to the latter, “cost to the
wholesaler”, as provided by section two, subparagraph ten
of this article, except that no such sale shall be made at a
price less than the “basic cost of cigarettes” as defined in
said section two, subparagraph nine of this article, but the
latter wholesaler upon resale to a retailer, shall be deemed
to be the wholesaler governed by the provisions of said
section two, subparagraph ten of this article.

Sec. 5. Combination Sales.—In all advertisements, offers
for sale or sales involving two or more items, at least
one of which items is cigarettes, at a combined price, and
in all advertisements, offers for sale or sales involving the
giving of any concession of any kind whatsoever (whether
it be coupons or otherwise), the retailer's or wholesaler's
selling price shall not be below the “cost to the retailer”
or the “cost to the wholesaler”, respectively, of the cig-
arettes included in such transactions, and the invoice cost,
whether the same be paid by the retailer, the wholesaler
or any other person, of all articles, products, commodi-
ties and concessions included in such transactions, to
which invoice cost shall be added, the cost of doing busi-
ness in the case of the wholesaler and the retailer, re-
spectively, as such is defined in section two hereof.

Sec. 6. Exemptions.—The provisions of this article shall
not apply to sales at retail or sales at wholesale made
Sec. 7. Sales to Meet Competition.—(a) Any retailer may advertise, offer to sell, or sell cigarettes at a price made in good faith to meet the price of a competitor who is selling the same article at cost to him as a retailer as prescribed in this article. Any wholesaler may advertise, offer to sell, or sell cigarettes at a price made
in good faith to meet the price of a competitor who is
rendering the same type of service and is selling the
same article at cost to him as a wholesaler as prescribed
in this article. The price of cigarettes advertised, offered
for sale, or sold under the exceptions specified in section
six shall not be considered the price of a competitor and
shall not be used as a basis for establishing prices below
cost, nor shall the price established at a bankrupt sale
be considered the price of a competitor within the pur-
view of this section.

(b) In the absence of proof of the “price of a com-
petitor” under this section, the “lowest cost to the re-
tailer”, or the “lowest cost to the wholesaler”, as the case
may be, determined by any “cost survey”, made pursuant
to section eleven of this article, may be deemed the “price
of a competitor”, within the meaning of this section.

Sec. 8. Contracts in Violation Void.—Any contract, ex-
press or implied, made by any person in violation of any
of the provisions of this article, is declared to be an illegal
and void contract and no recovery thereon shall be had.

Sec. 9. Evidence to Be Considered as Bearing on bona
(a) In determining "cost to the retailer" and "cost to the wholesaler" the commissioner or a court shall receive and consider as bearing on the bona fides of such cost, evidence tending to show that any person complained against under any of the provisions of this article purchased cigarettes, with respect to the sale of which complaint is made, at a fictitious price, or upon terms, or in such a manner, or under such invoices, as to conceal the true cost, discounts or terms of purchase, and shall also receive and consider as bearing on the bona fides of such cost, evidence of the normal, customary and prevailing terms and discounts in connection with other sales of a similar nature in the trade area or state.

(b) Merchandise given gratis or payment made to a retailer or wholesaler by the manufacturer thereof for display, or advertising, or promotion purposes, or otherwise, shall not be considered in determining the cost of cigarettes to the retailer or wholesaler.

Sec. 10. Cigarettes Purchased Outside Ordinary Trade Channels.—In establishing the cost of cigarettes to the retailer or wholesaler, the invoice cost of said cigarettes
purchased at a forced, bankrupt, or closeout sale, or other
sale outside of the ordinary channels of trade, may not be
used as a basis for justifying a price lower than one based
upon the replacement cost of the cigarettes to the re-
tailer or wholesaler in the quantity last purchased, through
the ordinary channels of trade.

Sec. 11. Cost Survey.—Where a cost survey, pursuant
to recognized statistical and cost accounting practices, has
been made for the trading area in which the offense is
committed, to establish the lowest "cost to the retailer"
and the lowest "cost to the wholesaler", said cost survey
shall be deemed competent evidence to be used in prov-
ing the cost to the person complained against within the
provisions of this article.

Sec. 12. Remedies.—(a) In addition to penalties pro-
vided by section three of this article, any person injured
by any violation of this article, or any trade association
which is representative of such a person, may maintain
an action in any court of equitable jurisdiction to prevent,
restrain or enjoin such violation. If in such action a viola-
tion of this article shall be established, the court shall en-
join and restrain or otherwise prohibit such violation and
in addition thereto shall assess in favor of the plaintiff and
against the defendant the costs of the suit and reasonable
attorneys' fees. In such action it shall not be necessary
that actual damages to the plaintiff be alleged or proved,
but where alleged and proved the plaintiff in said action,
in addition to such injunctive relief and fees and costs of
suit, shall be entitled to recover from the defendant the
amount of actual damages sustained by the plaintiff.
(b) In the event no injunctive relief is sought or re-
quired, any person injured by a violation of this article
may maintain an action for damages alone in any court of
competent jurisdiction and the measure of damages in
such action shall be the same as prescribed in subsection
(a) of this section.

Sec. 13. State Tax Commissioner; Powers and Duties.—
(a) The state tax commissioner shall have the power to
adopt, amend and repeal rules and regulations necessary
to enforce and administer the provisions of this article.
The commissioner is given full power and authority to
revoke or suspend the license or permit of any wholesale
or retail dealer in the state of West Virginia upon suffi-
cient cause appearing of the violation of this article or
upon the failure of such licensee or permittee to comply
with any of the provisions of this article.

(b) No license or licenses shall be suspended or revoked
except upon notice to the licensee and after a hearing as
prescribed by said commissioner. The said commissioner,
upon a finding by him that the licensee has failed to com-
ply with any provision of this article or any rule or regu-
lation promulgated thereunder, shall, in the case of the
first offender, suspend the license or licenses of the said
licensee for a period of not less than five nor more than
twenty consecutive business days, and, in the case of a
second or plural offender, shall suspend said license or
licenses for a period of not less than twenty consecutive
business days nor more than twelve months and, in the
event the said commissioner finds the offender has been
guilty of willful and persistent violations, he may revoke
said person's license or licenses.

(c) Any person whose license or licenses have been so
revoked may apply to the commissioner at the expiration
of one year for a reinstatement of his license or licenses. Such license or licenses may be reinstated by the commission if it shall appear to the satisfaction of said commissioner that the licensee will comply with the provisions of this article and the rules and regulations promulgated thereunder. (d) No person whose license has been suspended or revoked shall sell cigarettes or permit cigarettes to be sold during the period of such suspension or revocation on the premises occupied by him or upon other premises controlled by him or others or in any other manner or form whatever. Nor shall any disciplinary proceedings or action be barred or abated by the expiration, transfer, surrender, continuance, renewal or extension of any license issued under the provisions of the cigarette tax law. (e) Any determination by the commissioner and any order of suspension or revocation of a license or licenses thereunder or refusal to reinstate a license or licenses after revocation shall be reviewable by the court in a proper case and in proceedings as provided by procedural law of this jurisdiction.
Sec. 14. Provisions of Article Severable.—The provisions of this article shall be severable and if any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this article shall continue in full force and effect.

Sec. 15. Repealing Clause.—All laws and parts of laws in conflict herewith are hereby repealed.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the House.


Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within... approved... this the... day of... March, 1961.

Governor

Filed in Office of the Secretary of State of West Virginia, MAR 16 1961

JOE F. BURDETT
SECRETARY OF STATE