

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1961

85
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ENROLLED

HOUSE BILL No. 85.....

(By Mr. Gratherton.....)

PASSED March 9th..... 1961

In Effect July 1st 1961..... Passage

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of West Virginia MAR 16 1961

JOE 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:

Article 13. Cigarette Sales Act.

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

Sec. 2. *Definitions.*—When used in this article, the following words and phrases shall have the meaning ascribed to them in this section except where the context clearly indicates a different meaning:

5 (1) "Person" shall mean and include any individual,
6 firm, association, company, partnership, corporation, joint
7 stock company, club, agency, syndicate, municipal cor-
8 poration or other political subdivision of this state, trust,
9 receiver, trustee, fiduciary and conservator.

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

11 (a) Purchases cigarettes directly from the manufac-
12 turer; or

13 (b) Purchases cigarettes from any other person who
14 purchases from the manufacturer and who acquires such
15 cigarettes solely for the purpose of bona fide resale to re-
16 tail dealers or to other persons for the purposes of resale
17 only; or

18 (c) Services retail outlets by the maintenance of an
19 established place of business for the purchase of cigar-
20 ettes, including, but not limited to, the maintenance of
21 warehousing facilities for the storage and distribution of
22 cigarettes.

23 Nothing contained herein shall prevent a person from
24 qualifying in different capacities as both a "wholesaler"
25 and "retailer" under the applicable provisions of this ar-
26 ticle.

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-

48 duct of the wholesaler's business, to a retailer for the
49 purpose of resale.

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

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

66 (10) (a) The term "cost to the wholesaler" shall mean
67 the "basic cost of cigarettes" to the wholesaler plus the
68 "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-

90 ards and methods of accounting regularly employed by
91 him in his allocation of overhead costs and expenses, paid
92 or incurred, and must include, without limitation, labor
93 (including salaries of executives and officers), rent, de-
94 preciation, selling costs, maintenance of equipment, de-
95 livery costs, all types of licenses, taxes, insurance and
96 advertising: *Provided*, That any retailer who, in connec-
97 tion with the retailer's purchase, receives not only the
98 discounts ordinarily allowed upon purchases by a whole-
99 saler but also shall, in determining "costs to the retailer",
100 pursuant to this sub-section, add the "cost of doing busi-
101 ness by the wholesaler", as defined in section two, sub-
102 paragraph ten of this article, to the "basic cost of cigar-
103 ettes" to said retailer, as well as the "cost of doing business
104 by the retailer".

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

110 (c) In the absence of the filing with the commissioner

111 of satisfactory proof of a lesser or higher cost of doing
112 business, the "cost of doing business by the retailer", who,
113 in connection with the retailer's purchase, receives not
114 only the discounts ordinarily allowed upon purchases by
115 a retailer but also, in whole or in part, the discounts ordi-
116 narily allowed upon purchases by a wholesaler, shall be
117 presumed to be ten per centum of the sum of the "basic
118 cost of cigarettes" and the "cost of doing business by the
119 wholesaler".

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

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

3 (a) For any retailer or wholesaler with intent to in-
4 jure competitors or destroy or substantially lessen com-
5 petition:

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

9 (2) To offer a rebate in price, to give a rebate in price,
10 to offer a concession of any kind, or give a concession of

11 any kind or nature whatsoever in connection with the
12 sale of cigarettes, ~~which~~, when the amount of such rebate *cc*
13 or value of such concession is deducted from the total *OK*
14 price at which the cigarettes are sold, would have the *clp*
15 result of reducing the price to less than cost to such
16 retailer or wholesaler.

17 (b) For any retailer:

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

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

25 (c) Any retailer or wholesaler who violates the provi-
26 sions of this section shall be guilty of a misdemeanor and
27 shall be prosecuted and punished by a fine of not more
28 than five hundred dollars for each such offense. Any in-
29 dividual who as a director, officer, partner, member or
30 agent of any person violating the provisions of this article
31 assists or aids, directly or indirectly in such violation,

32 shall, equally with the person for whom he acts, be re-
33 sponsible therefor and subject to the punishment and
34 penalties set forth herein.

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

Sec. 4. *Sales from Wholesaler to Wholesaler, and to*
2 *Certain Retailers.*—When one wholesaler sells cigarettes to
3 any other wholesaler, the former shall not be required to
4 include in his selling price to the latter, "cost to the
5 wholesaler", as provided by section two, subparagraph ten
6 of this article, except that no such sale shall be made at a
7 price less than the "basic cost of cigarettes" as defined in

8 said section two, subparagraph nine of this article, but the
9 latter wholesaler upon resale to a retailer, shall be deemed
10 to be the wholesaler governed by the provisions of said
11 section two, subparagraph ten of this article.

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

Sec. 6. *Exemptions.*—The provisions of this article shall
2 not apply to sales at retail or sales at wholesale made

3 (a) as an isolated transaction and not in the usual course
4 of business; (b) where cigarettes are advertised, offered
5 for sale, or sold in bona fide clearance sales for the pur-
6 pose of discontinuing trade in such cigarettes and said
7 advertising, offer to sell, or sale shall state the reason
8 thereof and the quantity of such cigarettes advertised,
9 offered for sale, or to be sold; (c) where cigarettes are
10 advertised for sale, or sold as imperfect or damaged, and
11 said advertising, offer to sell, or sale shall state the rea-
12 son therefor and the quantity of such cigarettes adver-
13 tised, offered for sale, or to be sold; (d) where cigarettes
14 are sold upon the final liquidation of a business; or (e)
15 where cigarettes are advertised, offered for sale, or sold
16 by any fiduciary or other officer acting under the order of
17 direction of any court.

Sec. 7. *Sales to Meet Competition.*—(a) Any retailer
2 may advertise, offer to sell, or sell cigarettes at a price
3 made in good faith to meet the price of a competitor
4 who is selling the same article at cost to him as a re-
5 tailer as prescribed in this article. Any wholesaler may
6 advertise, offer to sell, or sell cigarettes at a price made

7 in good faith to meet the price of a competitor who is
8 rendering the same type of service and is selling the
9 same article at cost to him as a wholesaler as prescribed
10 in this article. The price of cigarettes advertised, offered
11 for sale, or sold under the exceptions specified in section
12 six shall not be considered the price of a competitor and
13 shall not be used as a basis for establishing prices below
14 cost, nor shall the price established at a bankrupt sale
15 be considered the price of a competitor within the pur-
16 view of this section.

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

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

27 Sec. 9. *Evidence to Be Considered as Bearing on Bona*

2 *Fides of Cost.*—(a) In determining “cost to the retailer”
3 and “cost to the wholesaler” the commissioner or a court
4 shall receive and consider as bearing on the bona fides
5 of such cost, evidence tending to show that any person
6 complained against under any of the provisions of this
7 article purchased cigarettes, with respect to the sale of
8 which complaint is made, at a fictitious price, or upon
9 terms, or in such a manner, or under such invoices, as
10 to conceal the true cost, discounts or terms of purchase,
11 and shall also receive and consider as bearing on the bona
12 fides of such cost, evidence of the normal, customary and
13 prevailing terms and discounts in connection with other
14 sales of a similar nature in the trade area or state.

15 (b) Merchandise given gratis or payment made to a
16 retailer or wholesaler by the manufacturer thereof for
17 display, or advertising, or promotion purposes, or other-
18 wise, shall not be considered in determining the cost of
19 cigarettes to the retailer or wholesaler.

Sec. 10. Cigarettes Purchased Outside Ordinary Trade

2 *Channels.*—In establishing the cost of cigarettes to the
3 retailer or wholesaler, the invoice cost of said cigarettes

4 purchased at a forced, bankrupt, or closeout sale, or other
5 sale outside of the ordinary channels of trade, may not be
6 used as a basis for justifying a price lower than one based
7 upon the replacement cost of the cigarettes to the re-
8 tailer or wholesaler in the quantity last purchased, through
9 the ordinary channels of trade.

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

Sec. 12. *Remedies*.—(a) In addition to penalties pro-
2 vided by section three of this article, any person injured
3 by any violation of this article, or any trade association
4 which is representative of such a person, may maintain
5 an action in any court of equitable jurisdiction to prevent,
6 restrain or enjoin such violation. If in such action a viola-
7 tion of this article shall be established, the court shall en-

8 join and restrain or otherwise prohibit such violation and
9 in addition thereto shall assess in favor of the plaintiff and
10 against the defendant the costs of the suit and reasonable
11 attorneys' fees. In such action it shall not be necessary
12 that actual damages to the plaintiff be alleged or proved,
13 but where alleged and proved the plaintiff in said action,
14 in addition to such injunctive relief and fees and costs of
15 suit, shall be entitled to recover from the defendant the
16 amount of actual damages sustained by the plaintiff.

17 (b) In the event no injunctive relief is sought or re-
18 quired, any person injured by a violation of this article
19 may maintain an action for damages alone in any court of
20 competent jurisdiction and the measure of damages in
21 such action shall be the same as prescribed in subsection
22 (a) of this section.

Sec. 13. *State Tax Commissioner; Powers and Duties.*—

2 (a) The state tax commissioner shall have the power to
3 adopt, amend and repeal rules and regulations necessary
4 to enforce and administer the provisions of this article.
5 The commissioner is given full power and authority to
6 revoke or suspend the license or permit of any wholesale

7 or retail dealer in the state of West Virginia upon suffi-
8 cient cause appearing of the violation of this article or
9 upon the failure of such licensee or permittee to comply
10 with any of the provisions of this article.

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

26 (c) Any person whose license or licenses have been so
27 revoked may apply to the commissioner at the expiration

28 of one year for a reinstatement of his license or licenses.
29 Such license or licenses may be reinstated by the commis-
30 sioner if it shall appear to the satisfaction of said com-
31 missioner that the licensee will comply with the provi-
32 sions of this article and the rules and regulations promul-
33 gated thereunder.

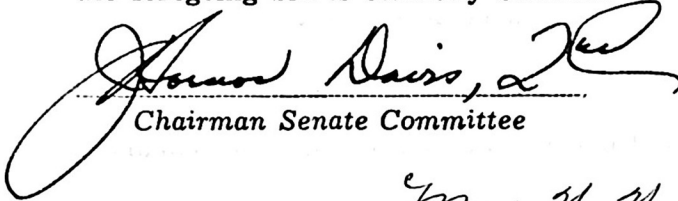
34 (d) No person whose license has been suspended or re-
35 voked shall sell cigarettes or permit cigarettes to be sold
36 during the period of such suspension or revocation on
37 the premises occupied by him or upon other premises
38 controlled by him or others or in any other manner or
39 form whatever. Nor shall any disciplinary proceedings
40 or action be barred or abated by the expiration, transfer,
41 surrender, continuance, renewal or extension of any
42 license issued under the provisions of the cigarette tax
43 law.

44 (e) Any determination by the commissioner and any
45 order of suspension or revocation of a license or licenses
46 thereunder or refusal to reinstate a license or licenses
47 after revocation shall be reviewable by the court in a
48 proper case and in proceedings as provided by procedural
49 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.

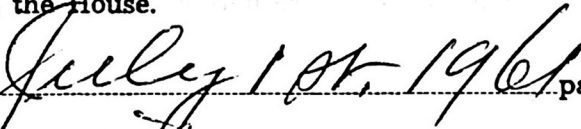
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.


Chairman Senate Committee

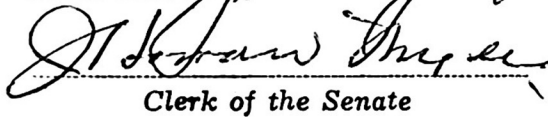

Chairman House Committee

Originated in the House.


Takes effect




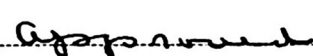
passage.


Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker House of Delegates

The within  this the 16th
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