

## LEGISLATIVE BILL 234

Approved by the Governor March 17, 1971

Introduced by Terry Carpenter, 48th District

AN ACT to amend sections 53-123.03 and 53-130, Reissue Revised Statutes of Nebraska, 1943, and section 53-103, Revised Statutes Supplement, 1969, relating to liquors; to define and redefine terms; to state policy; to regulate the relationship between manufacturers of beer and their distributors as prescribed; to provide procedures; to provide penalties; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. It is the declared policy of the State of Nebraska that it is necessary to regulate and control the agreements, franchises and relationships between manufacturers of beer and their distributors for the purpose of fostering and promoting temperance in consumption thereof and to promote respect for and obedience to the laws controlling the distribution and sale of beer. It is necessary to accomplish the declared policy in order to eliminate the undue stimulation of sales of beer in this state by manufacturers inducing, coercing or attempting to induce or coerce distributors of beer to do acts detrimental to the orderly and lawful distribution thereof by threatened or actual termination of the manufacturer and distributor relationship, directly or indirectly, or by the establishment of dual distributors of a brand or brands thereof in a territory presently served by a distributor. It is the further declared policy of the State of Nebraska that temperance and the obedience to the laws controlling the distribution and ultimate sale of beer is promoted by legislation encouraging distributors of beer to make investments in their facilities to serve retail licensees by providing for the succession of their distributorships and to protect them against the terminations of such distributorships or other acts described herein without the manufacturers' establishing good cause for such termination or other such acts in proceedings before the Nebraska Liquor Control Commission or before the courts of this state, as the case may be. The Legislature further recognizes the distinction between the nature of the distribution of beer and other alcoholic liquors in that the other distributors are franchised by

manufacturers to distribute many brands of various kinds of alcoholic liquors and are not as vulnerable to the economic pressures of the manufacturers as beer distributors, which traditionally handle mainly one brand of beer or, in rare instances, only two or three brands of beer in their distributorships.

Sec. 2. That section 53-103, Revised Statutes Supplement, 1969, be amended to read as follows:

53-103. Unless the context otherwise requires, the definitions given in this section shall apply in all cases where any one of the defined terms appears in sections 53-101 to 53-1,118 and sections 1 and 3 to 17 of this act.

(1) This act shall be construed as referring exclusively to said sections.

(2) Alcohol shall mean the product of distillation of any fermented liquid, whether rectified or diluted, whatever may be the origin thereof, and shall include synthetic ethyl alcohol. It shall not include denatured alcohol or wood alcohol.

(3) Spirits shall mean any beverage which contains alcohol obtained by distillation, mixed with water or other substance in solution, and shall include brandy, rum, whiskey, gin, or other spirituous liquors, and such liquors when rectified, blended, or otherwise mixed with alcohol or other substances.

(4) Wine shall mean any alcoholic beverage obtained by the fermentation of the natural contents of fruits or vegetables, containing sugar, including such beverages when fortified by the addition of alcohol or spirits, as above defined.

(5) Beer shall mean a beverage obtained by alcoholic fermentation of an infusion or concoction of barley, or other grain, malt, and hops in water, and shall include, among other things, beer, ale, stout, lager beer, near beer, porter and the like.

(6) Alcoholic liquor shall include the four varieties of liquor above defined, alcohol, spirits, wine, and beer, and every liquid or solid, patented or not, containing alcohol, spirits, wine, or beer, and capable of being consumed as a beverage by a human being. The provisions of this act shall not apply to (a) alcohol used in the manufacture of denatured alcohol produced in accordance with acts of Congress and

regulations promulgated thereunder, (b) flavoring extracts, syrups, or medicinal, mechanical, scientific, culinary, or toilet preparations, or food products unfit for beverage purposes, but shall not be construed to exclude or not apply to alcoholic liquor used in the manufacture, preparation, or compounding of such products, or (c) wine intended for use and used by any church or religious organization for sacramental purposes.

(7) Original package shall mean any bottle, flask, jug, can, cask, barrel, keg, hogshead, or other receptacle or container whatsoever, used, corked, or capped, sealed, and labeled by the manufacturer of alcoholic liquor, to contain and to convey any alcoholic liquor.

(8) Manufacturer shall mean every brewer, fermenter, distiller, rectifier, winemaker, blender, processor, bottler, or person who fills or refills an original package and others engaged in brewing, fermenting, distilling, rectifying, or bottling alcoholic liquors as above defined.

(9) Nonbeverage user shall mean every manufacturer of any of the products set forth and described in section 53-160, when the same contains alcoholic liquor, and all laboratories, hospitals, and sanatoria using alcoholic liquor for nonbeverage purposes.

(10) Manufacture shall mean to distill, rectify, ferment, brew, make, mix, concoct, process, blend, bottle, or fill an original package with any alcoholic liquor, and shall include blending but shall not include the mixing or other preparation of drinks for serving by those persons authorized and permitted in this act to serve drinks for consumption on the premises where sold.

(11) Distributor, distributorship, wholesaler, or jobber shall mean the person, as hereinafter defined, importing or causing to be imported into the state, or purchasing or causing to be purchased within the state, alcoholic liquors for sale or resale to retailers licensed under this act, whether the business of the distributor, distributorship, wholesaler, or jobber is conducted under the terms of a franchise or any other form of an agreement with a manufacturer or manufacturers, or has caused alcoholic liquors to be imported into the state or purchased in the state from a manufacturer or manufacturers and was licensed to conduct such a business by the commission on May 1,

1970. or has been so licensed since that date.

(12) Person shall mean any natural person, corporation, partnership, or association.

(13) Retailer shall mean a person who sells, or offers for sale, alcoholic liquors for use and consumption and not for resale in any form.

(14) Sell at retail and sale at retail shall refer to and mean sales for use or consumption and not for resale in any form.

(15) Commission shall mean the Nebraska Liquor Control Commission.

(16) Sale shall mean any transfer, exchange, or barter in any manner or by any means whatsoever for a consideration, and shall include all sales made by any person, whether principal, proprietor, agent, servant, or employee.

(17) To sell shall mean to solicit or receive an order for, to keep or expose for sale, or to keep with intent to sell.

(18) Restaurant shall mean any public place kept, used, maintained, advertised, and held out to the public as a place where meals are served, and where meals are actually and regularly served, without sleeping accommodations, such place being provided with adequate and sanitary kitchen and dining room equipment and capacity and having employed therein a sufficient number and kind of employees to prepare, cook, and serve suitable food for its guests.

(19) Club shall mean a corporation organized under the laws of this state, not for pecuniary profit, solely for the promotion of some common object other than the sale or consumption of alcoholic liquors, kept, used, and maintained by its members through the payment of annual dues, and owning, hiring, or leasing a building or space in a building, of such extent and character as may be suitable and adequate for the reasonable and comfortable use and accommodation of its members and their guests and provided with suitable and adequate kitchen and dining room space and equipment and maintaining a sufficient number of servants and employees for cooking, preparing, and serving food and meals for its members and their guests; Provided, that such club files with the local governing body at the time of its application for a license under this act two

copies of a list of names and residences of its members, and similarly files within ten days of the election of any additional member his name and address; and provided further, that its affairs and management are conducted by a board of directors, executive committee, or similar body chosen by the members at their annual meeting, and that no member or any officer, agent, or employee of the club is paid, or directly or indirectly receives, in the form of salary or other compensation, any profits from the distribution or sale of alcoholic liquor to the club or the members of the club or its guests introduced by members other than the amount of such salary as may be fixed and voted at any annual meeting by the members or by its board of directors or other governing body out of the general revenue of the club.

(20) Hotel shall mean every building or other structure kept, used, maintained, advertised, and held out to the public to be a place where food is actually served and consumed and sleeping accommodations are offered for adequate pay to travelers and guests, whether transient, permanent, or residential, in which twenty-five or more rooms are used for the sleeping accommodations of such guests and having one or more public dining rooms where meals are served to such guests, such sleeping accommodations and dining rooms being conducted in the same buildings in connection therewith and such building or buildings, structure or structures being provided with adequate and sanitary kitchen and dining room equipment and capacity.

(21) Nonprofit corporation shall mean a corporation, whether located within any incorporated city or village or not, organized under the laws of this state, not for profit, and which has been exempted from the payment of federal income taxes, as provided by section 501 (c), (4), (7) or (8), Internal Revenue Code of 1954, on November 22, 1963.

(22) The words bottle club shall mean an operation, whether formally organized as a club having a regular membership list, dues, officers, and meetings or not, keeping and maintaining premises where persons who have made their own purchases of alcoholic liquors congregate for the express purpose of consuming such alcoholic liquors upon the payment of a fee or other consideration, including among other services the sale of foods, ice, mixes, or other fluids for alcoholic drinks and the maintenance of space for the storage of alcoholic liquors belonging to such persons and facilities for the dispensing of such liquors through a locker system, card system, or pool system, which shall

not be deemed or considered a sale of alcoholic liquor. Such operation may be conducted by a club as defined in subdivision (19) of this section, an individual, partnership, or corporation. An accurate and current membership list shall be maintained upon the premises which contains the names and residences of its members.

(23) Minor shall mean any person, male or female, under twenty years of age, regardless of marital status.

(24) The term brand shall mean alcoholic liquors which are identified as the product of a specific manufacturer.

(25) The terms franchise or agreement when used with reference to the relationship between a manufacturer and distributor, shall include one or more of the following: (a) A commercial relationship of a definite duration or continuing indefinite duration which is not required to be in writing; (b) the relationship whereby the franchisee is granted the right to offer and sell brands thereof by the franchisor; (c) the relationship whereby the franchise, as an independent business, constitutes a component of franchisor's distribution system; (d) the operation of franchisee's business is substantially associated with the franchisor's brand, advertising or other commercial symbol designating the franchisor; and (e) the operation of the franchisee's business is substantially reliant on the franchisor for the continued supply of beer.

(26) The term franchisor shall have the same meaning as the term manufacturer as defined in subdivision (8) of this section.

(27) The term franchisee shall have the same meaning as the terms distributor, distributorship, wholesaler or jobber as defined in subdivision (11) of this section.

(28) The terms territory or sales territory shall mean the franchisee or distributor's area of sales responsibility for the brand or brands of the manufacturer.

Sec. 3. No manufacturer shall (1) induce or coerce, or attempt to induce or coerce, any distributor to accept delivery of any alcoholic liquor, any form of advertisement, or any other commodity which shall not have been ordered by the distributor; (2) induce or coerce, or attempt to induce or coerce, any distributor

to enter into any agreement with such manufacturer, or do any other act unfair to the distributor, by threatening to cancel any distributorship existing between such manufacturer, or representative thereof, and such distributor, or to add competition in the distribution of the brand or brands of beer in the established territory of the existing distributor; (3) unfairly, without due regard to the equities of the distributor, cancel, induce, coerce, or attempt to induce or coerce any distributor to resign its distributorship relationship with such manufacturer, or fail to renew the distributorship of any distributor; (4) fail or refuse to deliver to a distributor having a distributorship, or contractual arrangement for the distribution of alcoholic liquor for the manufacturer, any alcoholic liquor publicly advertised for immediate sale within sixty days after such distributor's order shall have been received.

Sec. 4. Notwithstanding the terms, provisions or conditions of any agreement or franchise, no manufacturer shall terminate or refuse to continue any distributorship with which it has a franchise or agreement, as defined in section 53-103, or cause a distributor to resign from such franchise or agreement, unless such manufacturer has first established under the provisions of this act that the manufacturer has good cause for the termination, noncontinuation or causing such resignation; Provided, that such good cause shall exist if a distributor's license to do business in the state is revoked under the provisions of Chapter 53.

Sec. 5. No manufacturer shall enter into any franchise or agreement for the purpose of establishing an additional distributor for its brand or brands in the territory being served by a licensed distributor unless the provisions of this act are complied with by the manufacturer and the distributor proposing to distribute such manufacturer's brand or brands.

Sec. 6. In the event that a manufacturer seeks to terminate or not continue, by causing a resignation or otherwise, to do business with its distributorship in the sales territory in Nebraska served by such distributorship as of the commencement of the licensing year, May 1, 1970, and such manufacturer desires to establish a new, replacement or additional distributorship of its brand or brands in that sales territory, the manufacturer and the new, replacement or additional distributorship shall cause an application to be filed with the commission to have the existing distributor's license terminated or not renewed and at

the same time they also shall cause an application to be filed with the commission under the provisions of section 53-130 for authority to license the new, replacement or additional distributorship for that manufacturer's brand or brands.

Sec. 7. Upon receiving such applications, the commission shall enter an order fixing a time, which shall be within ninety days of the date of the order, and a place of hearing, and shall by certified or registered mail, with return receipt requested, send a copy of such order to the applicants and the involved manufacturer and existing distributorship. The commission may also give notice of the applications to any other persons whom the commission may deem to be interested parties, with such notice to be in the form and substance and given in the manner the commission deems appropriate.

Any person who can show an interest in the applications may become a party to the hearing, whether or not such a person receives notice thereof; Provided, that a party not receiving notice shall be limited to participation at the hearing on the question of the public interest in the termination or noncontinuation of the distributorship or in the establishment of a new, replacement or additional distributorship for the sale of the manufacturer's brand or brands, as the case may be.

Sec. 8. If the commission finds it desirable it may continue the date of hearing for a period of ninety days, and may upon application, but not ex parte, continue the date of hearing for an additional period of ninety days.

Sec. 9. The hearings on applications provided for in section 6 of this act shall be held at the same time and place and on a consolidated record. Upon hearing, the manufacturer and applicant for the selling of the manufacturer's brand or brands shall have the burden of proof to establish under the provisions of this act that the applications should be granted and that as a result thereof the existing distributor's license should be terminated, by a caused resignation or otherwise, or not renewed and that the application of the new, replacement or additional distributor to sell the manufacturer's brand or brands should be granted. Nothing contained in this act shall be construed to require any investigation by the commission of any matter before the commission under this act. Upon hearing, the commission shall hear the evidence



introduced by the parties and shall make its decision solely upon the record so made.

Sec. 10. The rules of civil procedure relating to discovery and inspection shall apply to hearings held under the provisions of this act, and the commission may issue orders to give effect to such rules.

In the event issues are raised which would involve violations of any state or federal antitrust or price-fixing law, all discovery and inspection proceedings which would be available under such issues in a state or federal court action shall be available to the parties to the hearing, and the commission may issue orders to give effect to such proceedings.

Evidence which would be admissible under the issues in a state or federal court action shall be admissible in a hearing held by the commission.

Sec. 11. Notwithstanding the terms, provisions or conditions of any agreement or franchise, the following shall not constitute good cause for the termination or noncontinuation, by caused resignation or otherwise, of a distributorship by a manufacturer or for the entering into a new agreement by such manufacturer for the establishment of a new, replacement or additional distributorship for its brand or brands in the sales territory of the existing distributorship:

(1) The sole fact that the manufacturer desires further sales penetration of the market of its brand or brands;

(2) The fact that the distributor is selling allied products, other products, or other brands of beer;

(3) The change of ownership of the existing distributorship or the change of executive management of such distributorship unless the manufacturer, having the burden of proof, proves that such change of ownership or executive management will be substantially detrimental to the distribution of the manufacturer's brand or brands in such distributorship's sales territory: or

(4) The fact that the distributorship refused to purchase or accept delivery of any products or any other commodity or service not ordered by the existing distributorship or has not entered into promotional devices of such manufacturers which are unacceptable to such distributorship.

Sec. 12. In determining whether good cause has been established by the manufacturer for terminating or not continuing a distributorship by causing the resignation thereof or otherwise, the commission shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by such distributorship;

(2) Investment necessarily made and obligations incurred by the distributorship in the performance of the distributor's business;

(3) Permanency of the investment;

(4) Whether the distributorship has adequate warehouse facilities, truck equipment and personnel to reasonably provide customer service for the manufacturer's brand or brands;

(5) Except as provided in section 11 of this act, failure by the distributor to substantially comply with the requirements of the manufacturer which are determined by the commission to be reasonable and material; and

(6) Except as provided in section 11 of this act, bad faith of the distributor to comply with those requirements which are determined by the commission to be reasonable and material.

If the manufacturer has established good cause as required herein for the termination or not continuing a distributorship, by causing a resignation or otherwise, then the manufacturer shall have the further burden of proof to show that it gave to such distributorship notice of the grounds for such good cause and the distributor failed to reasonably correct the matters constituting such grounds within a reasonable time.

Sec. 13. In determining whether good cause has been established by the manufacturer for placing an additional distributorship in an existing distributor's sales territory for the same manufacturer's brand or brands, the commission shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by other distributorships of the same brand or brands, as the case may be, in comparable sales territories in the

state or in comparable sales territories in neighboring states if the involved manufacturer's brand or brands are not distributed by another distributorship in the state;

(2) Investment necessarily made and obligations incurred by the existing distributorship as compared to the investments of other distributorships of the same brand or brands in comparable sales territories in the state or comparable sales territories in neighboring states, if the involved manufacturer's brand or brands are not distributed by another distributorship in the state;

(3) Permanency of the investment made by the existing distributorship;

(4) The effect on the existing distributor of the adding of an additional distributorship in the same sales territory; and

(5) Whether the existing distributorship is providing adequate customer care in selling the brand or brands, of the manufacturer, which shall include service facilities and qualified personnel for such distribution.

If the manufacturer has established good cause as required herein for placing an additional distributor in an existing distributor's sales territory for the same manufacturer's brand or brands, then the manufacturer shall have the further burden of proof to show that it gave such distributorship notice of the grounds for such good cause and the distributor had failed to reasonably correct such grounds within a reasonable time.

Sec. 14. Any party to a hearing before the commission may take an appeal from any final order entered by the commission after the hearing provided for in this act in the manner provided for in section 52-1,116.

Sec. 15. In the event that a manufacturer, without complying with the requirements of this act, enters into or attempts to enter into a franchise or an agreement of any nature, whether upon termination by caused resignation or otherwise, or refusal to continue an existing distributorship or upon the establishment of an additional distributorship in the same sales territory of an existing distributorship, or attempts to have its brand or brands of alcoholic liquors sold in

such sales territory by a person other than such existing distributorship, such conduct shall constitute grounds for revocation or suspension by the commission of such manufacturer's shipping permit and other licenses to do business in the state. Prior to such revocation or suspension, the commission shall notify in writing the manufacturer at its licensed place of business that it is in violation of the provisions of this act and the time and place of the hearing on the charged violation. The commission's hearing shall be held within twenty days after the commission has so notified the manufacturer by certified or registered mail, return receipt requested. In the event any person, including the existing distributorship, shall file a written complaint with the commission of a violation of this section by a manufacturer, then the hearing on such written complaint shall be held not less than twenty days from the time of the filing thereof.

Sec. 16. Any party to a hearing before the commission, as provided in section 15 of this act, may take an appeal from a final order of the commission entered as a result of the hearing in the manner provided in section 53-1,116. If the commission revokes or suspends the license or permit, then, on appeal, the court, with which the appeal is filed, shall immediately restrain and enjoin the manufacturer from any further violations of section 15 of this act until the court finally determines the appeal.

Sec. 17. Notwithstanding the terms, provisions or conditions of a franchise or an agreement of any kind, it shall be unlawful for any manufacturer to not approve the transfer or change of ownership of a franchise, agreement or distributorship by the formation of a corporation wherein the present ownership owns the controlling interest in the corporation by sale thereof, or by succession by inheritance thereof; Provided, that the distributorship resulting from such transfer or ownership of the franchise, agreement or distributorship meets the requirements of an applicant for a distributor's license under the provisions of this act and will not be substantially detrimental to the representation of the manufacturer's brand or brands in the involved sales territory. In the event that the manufacturer denies such approval on the grounds of substantial detriment to the representation of its brand or brands in the involved sales territory, then the manufacturer shall have the burden of proving such grounds for denial and raise this issue at the time application is made with the commission for approval of the transfer or change of ownership under section

53-130.

Sec. 18. That section 53-123.03, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

53-123.03. A beer distributor's license shall allow the wholesale purchase, importation and storage of beer and sale of beer the brand or brands described in such license to licensees in this state except bottle club licensees, in the sales territory prescribed in the license for each brand, and to such persons without the state as may be permitted by law; and shall allow the licensee to do all things incident to the carrying on of the wholesale beer business.

Sec. 19. That section 53-130, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

53-130. New licenses to manufacturers, distributors, railroads, airlines, boats, and nonbeverage users of alcoholic liquors may be issued by the commission upon (1) written application in duplicate, to be filed in the manner and on such forms as the commission shall from time to time prescribe, and in which the applicant for a beer distributor's license shall set forth the sales territory in Nebraska in which it is authorized by a manufacturer or manufacturers to sell their brand or brands and the name of such brand or brands, (2) receipt of bond as provided in section 53-138.02, (3) payment in advance of the state registration fee and the license fee, and (4) such notice and hearing as the commission by its own order shall fix and a notice of such application shall be served upon the manufacturer or manufacturers listed in any application for a beer distributor's license and upon any existing distributor licensed to sell the brand or brands in the described sales territory. A license so issued may be renewed without formal application upon payment of license and registration fees; Provided, that the payment thereof shall be an affirmative representation and certification by the licensee that all answers contained in an application, if submitted, would be the same in all material respects as the answers contained in the last previous application; and provided further, that the commission may at any time require a licensee to submit an application.

Sec. 20. The provisions of sections 1 and 3 to 17 of this act shall apply to franchises, agreements, or distributorships for beer only and nothing in this act

shall prevent any manufacturer newly licensed under this act from appointing original distributorships in this state.

Sec. 21. That original sections 53-123.03 and 53-130, Reissue Revised Statutes of Nebraska, 1943, and section 53-103, Revised Statutes Supplement, 1969, are repealed.

Sec. 22. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.