MINUTES OF THE MEETING
BUSINESS AND LABOR COMMITTEE
50TH LEGISLATIVE SESSION

February 9, 1987

The meeting of the Business and Labor Committee was called to order by Chairman Les Kitselman on February 9, 1987 at 8:00 a.m. in Room 312-F of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Swysgood who was excused.

HOUSE BILL NO. 540 - Public Utility or City Exemptions From Electrical Law, sponsored by Rep. John Harp, House District No. 7, Kalispell. Chairman Kitselman stated that Rep. Harp had requested that this bill be tabled. Rep. Smith stated there was another bill that addresses this issue.

ACTION - Rep. Smith moved that House Bill No. 540 be TABLED. The motion carried unanimously.

HOUSE BILL NO. 475 - Gasoline Dealer Bill of Rights, sponsored by Rep. Barry Stang, House District No. 52, St. Regis. Rep. Stang stated that this bill was introduced because many gas station owners feel that jobbers and wholesale sellers have been taking advantage of them, and is referred to as the gas station owners bill of rights. He commented that sometimes under the contracts the station owner can be forced to make expensive improvements, and the company raises the price of the product or builds close to the original station that can sell the gas cheaper than he can which eventually forces him out of business. Another situation, he said, is that if the owner wants to leave the station to heirs, they do not have that right. He stated that this act would become effective upon passage and approval and would not affect any contracts in affect right now. Exhibit No. 1.

PROPONENTS

John Taggart, Conoco service station dealer and member of the Automotive Trades of Montana (ATOM). Mr. Taggart stated that the bill has omitted the motor fuel reseller, the oil jobbers, and he asked to amend the bill to include them, which is necessary to preserve the intent of the bill. He said that there is an article in one of the trade magazines that states that oil jobbers are covered by the federal laws that apply the same way that oil companies or refiners are. Exhibit Nos. 2 and 3.

Ron Leland, Sinclair Dealer and Treasurer of ATOM. Mr. Leland stated that the bill has a simple statement indicating a successor in interest. He said in the event of a death a lot of the leases are written to the point that the business is terminated immediately at that time, there is no stipulation that the wife or anyone can even remove the money from the cash register; and that this statement will help protect the heirs of the business. He commented that the designation of successor is limited to the retailer's spouse, adult child, or adult stepchild. He added that there are numerous court cases where a widower comes to the business and the locks have been changed and this statement in the bill will help protect the heirs of the business.

Mr. Leland commented that franchise fees are becoming very expensive in the service station business, and a normal service station dealer cannot comprehend the legal terms in the lease. He said if the lessor says he cannot sell a franchise to a third party than it is indicated that if he is going to block the sale because he wants the business, then the owner or his successor should be compensated for it. Exhibit No. 4.

Dick Skewis, independent service station dealer, Billings. Mr. Skewis stated the state laws and tax laws are changing everyday, and if the industry changes so should the laws. He said if his wife could not have the business should he die after he worked so hard for all of his life, there was no sense to that, and wanted some protection through the legislature.

Betty Taggart, service station dealer, Bozeman. Ms. Taggart stated that a person bought inventory and equipment from an existing dealer with the approval of the company, and in less than 60 days, the company announced a sell out. She said the person had not been told that the company would sell out or that he could not buy the tire jobbership. She said, it was stories such as this that made this legislation necessary.

Marge McCoy, private owner of Conoco, Gardiner. Ms. McCoy stated she supported this bill.

OPPONENTS

Kurt Krueger, Montana Western Petroleum Marketers Association. Mr. Krueger stated he was not opposing some of the concepts of the bill as they are valid and are concepts incurred in every day contracts in many types of businesses, but there were many problems with the bill. He said this bill is attempting to further legislate each and every specific requirement of the contract, but fails to do so.

He added that if a bill such as this was going to be introduced, franchising agreements as a whole should be considered for restaurants and hotels, not just service station dealers because the problems are not just within one specific unit. He explained the problems with each section of the bill, and that it did not deal with specifics.

Janelle Fallan, Executive Director, Montana Petroleum Association. Ms. Fallan stated that there are some real questions in consumer protection that are raised by section 9 of the bill. She said that many oil companies have spent millions of dollars in research to improve products to the public and in the area of advertising to entice the public to buy the products, and they stand behind their products. She added with this section the retailer is required to buy the gasoline from a station with an Exxon sign but it might not necessarily be Exxon gasoline in the pumps.

QUESTIONS

Rep. Driscoll asked if most refiners and wholesalers are incorporated, and Mr. Krueger replied the majority of the refiners are incorporated.

Rep. Driscoll stated that he had heard complaints from the people who sell the motor fuel to the motor fuel retailer that one gas station buying from Conoco or Exxon will pay a different wholesale price than their competition and they can't compete; he asked if the uniform commercial code would cover that situation. Mr. Krueger replied that it would not.

Rep. Jones asked Mr. Leland if someone dies, is there access to the bank accounts that the operator uses to operate the station. Mr. Leland responded that a lessee would have access to their own bank accounts because it is not under the control of the lessor. Mr. Krueger replied if there was a situation where a owner or lessor came in and took the money out of the cash register, there would be a lawsuit. He said that would be an example of unfair dealing and would be covered by the laws in the state of Montana in existence now, and is not affected by this legislation.

Rep. Pavlovich asked Rep. Stang who controls the price of gasoline in Montana. Rep. Stang replied there are probably two companies, one is Town Pump and Super America.

CLOSING

Rep. Stang stated that in section 3, regarding fair compensation, if a station is sold, the man who has run the business and put his life into it gets compensated only for

the inventory in the store and the gas in the ground; he gets no compensation for the customers he has built over the years of running the business. Incorporating, he said, isn't protection from debtors, and regarding taxes, the companies should be allowed to incorporate. He commented that regarding Ms. Fallan's statement of the big companies being protected from the type of gas that goes through the station, he said, a lot of times the jobber will represent more than one company; if you buy gas from a Conoco jobber, it doesn't mean it will be Conoco gas.

HOUSE BILL NO. 473 - Regulate Real Estate Property Management Brokers License, sponsored by Rep. Ray Brandewie, House District 49, Bigfork. Rep. Brandewie stated this bill would create a new type of brokerage license that would be limited to property management. He said that there currently are no provisions for a property management broker to become licensed unless he is licensed and proves his ability in all the areas of a person selling property.

PROPONENTS

Lyle McKenna, Board of Realty Regulation. Mr. McKenna stated that this bill would protect the public, because at the present time in order to manage property, a person must be a real estate broker or a salesman for a real estate broker. He commented if a person has this designation, there is no problem, it becomes a problem when a person is managing properties and wishes to become a real estate manager of property and is allowed to become a broker without going through the two year training for salesmen. He said this means a person who does not have the qualifications is out in the public as a real estate broker.

Helen Garrick, Board of Realty Regulation, a licensee and realtor. Ms. Garrick stated this bill would keep people in business, and that as projects grow larger more and more people who want to only do property management. She said that this bill would provide that in order to have the property management ability and stay within the law, they have to work under a real estate broker with a real estate salesman license, and if they want to be on their own, they have to obtain a broker's license.

OPPONENTS

Walter Jackovich, property manager, Butte. Mr. Jackovich stated that in 1974 a law was passed that exempted property managers in government funded and sponsored housing from the realty law so those properties could be managed. He said the realty laws of the state were written long before the

tenant and landlord act was enacted, and regulates any property management that comes into the state.

Mr. Jackovich commented that property management is a separate field from the realty and did not feel that the method was appropriate, and asked that reference to rental properties be stricken from the law and by creating something separate from that would service the public better.

QUESTIONS

Rep. Driscoll asked if a property manager is not required to have a license at the present time. Rep. Brandewie responded that was correct; that the law was being circumvented to some extent by people managing property with a special power of attorney with each client.

Rep. Driscoll asked if the bill passed and a person wanted to collect rent from property for friends, would he need a license. Rep. Brandewie responded that he would not; he would be exempted by the real estate laws.

Rep. Bachini stated that the comment was made that the Tenant Landlord Act took care of the problem and asked Rep. Brandewie to comment. Rep. Brandewie stated that the other act explains the relationship between a landlord and a tenant but the idea of this law is to make sure that the people who are dealing as an agent for the landlord know the law; that is the whole idea of licensure.

Rep. Hansen asked if the property management brokers are going to be managed separately from the real estate agent, would they be required to have a trust account because of the new system. Mr. McKenna stated they are amending a portion of the law, but are not amending the section that states they must have a trust account.

Rep. Hansen asked if there was anything in the Landlord Tenant Act that referred to a trust account. Mr. McKenna replied he assumed there was not.

Rep. Pavlovich asked if he owned properties and left town and asked a friend to take care of the properties, would that friend need to be licensed. Rep. Brandewie responded that person could take care of the properties now with a power of attorney for a temporary situation. However, he said, if someone hires out as a property manager and managing other people's money, he would have to be licensed and come under the laws of the state.

CLOSING

Rep. Brandewie stated that if a property manager wanted to become licensed under the laws, by allowing him to circumvent the course that he has to complete to get a regular real estate broker's license, would be foolish. He said if that person was allowed to take the broker's exam and work as a property manager, he could start selling real estate. Rep. Brandewie commented that this bill would allow a new type of broker with less qualifications of those that are fully licensed as real estate brokers.

HOUSE BILL NO. 541 - Revising Nurses Licensing Laws, sponsored by Rep. Clyde Smith, House District No. 5, Kalispell. Rep. Smith stated this bill was an act clarifying the terms of the Board of Nursing members, education requirements for nursing specialty areas, boards of authority to define unprofessional conduct, and clarifying the board's procedures for denial, revocation or suspension of a license.

PROPONENTS

Jeff Brazier, Staff Attorney, Department of Commerce. Mr. Brazier stated that on page 2, line 23, there has been some confusion over whether the public member on the board serves staggered terms or are appointed at the same time, and the board decided there needed to be some clarification. He said staggered terms provide continuity and knowledge. He explained the clarifications in the bill, and presented copies of the proposed amendment. Exhibit No. 5.

Margaret Barkley, President, Montana State Board of Nursing. Ms. Barkley presented written testimony. Exhibit No. 6.

Naomi Sommers, representing Board of Nursing. Ms. Sommers stated she supported the bill, and presented written testimony on behalf of Janice Anderson, a public member of the Board of Nursing, who could not be present at the hearing. Exhibit No. 7.

Barbara Booher, Executive Director, Montana Nurses Association. Ms. Booher submitted written testimony. Exhibit No. 8.

OPPONENTS

None.

QUESTIONS

Rep. Hansen asked if additional education was taken at a university or college, how would the education be certified under this bill. Mr. Brazier responded that the additional education beyond the basic degree and in a specialty area

requires a certification or credentialing by a trade association by a trade association and then additional state agency certification.

CLOSING

Rep. Smith made no further comments.

HOUSE BILL NO. 593 - Private Enterprise Act; Establishing A Review Commission, sponsored by Rep. Jan Brown, House District No. 46, Helena. Rep. Brown stated the bill was requested by the National Federation of Independent Business. She said there has been a lot of concern expressed about the increasing role of government and the areas it gets into that might be better done by private enterprise.

PROPONENTS

Riley Johnson, National Federation of Independent Business. Mr. Johnson presented written testimony, and stated they would be happy to work with a subcommittee. Exhibit Nos. 9, 10, and 11.

Don Ingels, Montana Chamber of Commerce. Mr. Ingels stated they support this bill, and reminded the committee that this was a priority issue at the White House Conference on Small Business regarding the area of competition between government and the private sector.

Ken Dunham, Associated Printers and Publishers of Montana. Mr. Dunham stated the printing industry faces severe competition from state government itself because more and more printing is being done inhouse in state government, and the business is moving away from the private sector. He said the key question in legislation of this type is if its economical, and is to the public's best interest, and the inclusion of all costs in the bill comparing state versus private contracts is critically important to the printing industry.

OPPONENTS

Ellen Feaver, Director, Department of Administration. Ms. Feaver stated she was a neutral opponent to give information only. She stated defining the proper role of government in private enterprise is a very important job that the legislature should address, and believed the way the bill was drafted had several unintended effects. She commented that there are a number of endeavors that state government is into that are not specifically authorized by statute, and would come to an abrupt stop, and as written has a

multimillion dollar impact, which a fiscal note would show if one had been written.

QUESTIONS

Rep. Driscoll asked if the provisions under section 4 of the bill would stop the Department of Highways from doing their own maintenance. Mr. Johnson responded it would not. He said the intention of the bill was not to stop any inhouse operation, but for inter agency.

Rep. Pavlovich asked what affect the bill would have on the prison. Mr. Johnson responded that the intent would be to create the review commission so that the issue can be looked at from a private enterprise--government competition standpoint and make recommendations to the legislature. He said they do not intend to do anything until the issues have been reviewed before the review commission so that should answer Ms. Feaver's concerns.

Chairman Kitselman commented the bill does have fiscal impact for the funding of the commission, and for some of the impacts it will have under the current operation, and he asked if a fiscal note had been prepared. Rep. Brown stated that a fiscal note had been requested, but it was very difficult to prepare a fiscal note on this. Ms. Feaver replied that a fiscal note had been requested, and had spent days working on it.

Chairman Kitselman asked if the fiscal note was on the state purchasing plan or if it dealt with the cost of the review commission. Ms. Feaver replied it primarily dealt with their interpretation of the bill as to what would happen after July 1 with the abolishing of the services that are now being provided in state government that would no longer be provided. She said that a totally different fiscal note would be needed if the bill was revised.

Chairman Kitselman stated that there were problems with the bill and he is referring it to a subcommittee to solve these problems; the subcommittee will be composed of Rep. Glaser, Rep. Cohen, and Rep. Grinde, with Rep. Glaser as chairman. He asked Rep. Glaser to be aware of the fiscal note for any severe impacts as they work on the bill.

CLOSING

Rep. Brown stated the bill was a broad approach and expressed the frustration on the part of private enterprise. She said the bill was intended to address the ever increasing government involvement, and there are certain areas where there are advantages to letting the state be involved.

She commented that the state employees are doing an admirable job under extremely difficult circumstances. She said she appreciated Ms. Feaver pointing out the problems with the bill, and having the bill referred to a subcommittee to solve them.

EXECUTIVE ACTION - February 9, 1987 - 10:10 a.m.

ACTION ON HOUSE BILL NO. 471

Chairman Kitselman commented that a gray bill was prepared because the revisions were so extensive.

Rep. Simon moved that House Bill No. 471 DO PASS.

Rep. Simon moved the amendments as they appeared in the gray bill. He said all references to dieticians have been stricken from the bill, which now addresses nutritionists. He said current state law already addresses licensed dieticians. He stated that they had made substantive changes in the exemptions from the act.

Rep. Driscoll moved a substitute motion to amend in the gray bill, page 5, line 5, following "practice" insert the word "only", which would read, "only a licensed nutritionist...".

Rep. Wallin asked if there was any reference to naturopaths in the bill. Rep. Simon responded there was no reference made, and it was the subcommittee's feeling that naturopaths represent themselves as naturopaths and not as nutritionists.

Rep. Simon stated that the amendment provided that people who are licensed have certain qualifications and only the people that meet those qualifications should do what they are qualified at doing, and this states that the license means something.

Rep. Simon moved a substitute motion to Rep. Driscoll's motion to amend, following "practice", strike "a licensed nutritionist or", and insert "only". The motion carried with Rep. Cohen opposed, and Rep. Swysgood absent.

Rep. Simon stated that the issue of traditional teachings and religious exemptions was also considered by the subcommittee as a possible amendment.

Mr. Verdon stated that the amendment would be a new subsection and would read, "a person from providing nutrition information based on traditional or religious teachings". Rep. Simon commented the amendment was too broad.

Chairman Kitselman commented that under the freedom of religion in this country that a person could practice, and said this amendment could broaden the meaning.

Rep. Hansen commented that the amendment is not needed because as long as that religious person or church did not present themselves as a nutritionist, they could do what they wanted.

Rep. Wallin commented that in his area they have 7th Day Adventists who have their own diet. He stated he respected that and felt the amendment should be inserted to include religions.

Rep. Brandewie commented that everyone should respect the religious teachings of others, but he resisted the amendment being put into the bill. He said he did not feel that religions should be licensed to give nutritional information.

Rep. Brandewie moved that House Bill No. 471 DO PASS AS AMENDED.

Rep. Simon moved the amendment to strike "dietetic" and insert "dietetic-nutrition". The motion carried with Rep. Swysgood absent.

Rep. Wallin moved to amend in subsection 10 to include, "a person from providing nutrition information based on traditional or religious teachings". The motion failed.

Rep. Simon moved that House Bill No. 471 DO PASS AS AMENDED. The motion carried with Rep. Cohen and Rep. Wallin opposed, and Rep. Swysgood absent.

ACTION ON HOUSE BILL 473

Rep. Brandewie moved that House Bill No. 473 DO PASS. The motion carried with Rep. Pavlovich and Rep. Bachini opposed.

ADJOURNMENT

The meeting adjourned at 11:10 a.m.

Les Kitselman

REP. LES KITSELMAN, Chairman

DAILY ROLL CALL

BUSINESS & LABOR COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date February 9, 1987

NAME	PRESENT	ABSENT	EXCUSED
REP. LES KITSELMAN, CHAIRMAN	✓		
REP. FRED THOMAS, VICE-CHAIRMAN	✓		
REP. BOB BACHINI	✓		
REP. RAY BRANDEWIE	✓		
REP. JAN BROWN	✓		
REP. BEN COHEN	✓		
REP. JERRY DRISCOLL	✓		
REP. WILLIAM GLASER	✓		
REP. LARRY GRINDE	✓		
REP. STELLA JEAN HANSEN	✓		
REP. TOM JONES	✓		
REP. LLOYD MCCORMICK	✓		
REP. GERALD NISBET	✓		
REP. BOB PAVLOVICH	✓		
REP. BRUCE SIMON	✓		
REP. CLYDE SMITH	✓		
REP. CHARLES SWYSGOOD			✓
REP. NORM WALLIN	✓		

CS-30

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AMENDMENTS

8. Page 1, line 21
Following: "act]"
Insert: ", unless the context requires otherwise,"

9. Page 1, line 23
Following: line 22
Insert: "(1) "Accredited" means accredited through the council on postsecondary accreditation of the U.S. department of education."
Renumber: subsequent subsections

10. Page 2, lines 2 and 3
Following: "of" on line 2
Strike: the remainder of line 2 and line 3 through "sciences"
Insert: "commerce"

11. Page 2, line 4
Strike: "Dietetic"
Insert: "Dietetic-nutrition"

12. Page 2, line 9
Strike: "dietetic"
Insert: "dietetic-nutrition"
Following: "assessment"
Strike: ","
Insert: "and"

13. Page 2, line 10
Following: "counseling"
Strike: ", and nutrition education"

14. Page 2, lines 11 and 12
Strike: subsection (5) in its entirety
Renumber: subsequent subsections

15. Page 3, lines 5 through 14
Following: "(3)" on line 5
Strike: the remainder of line 5 and lines 6 through 14 in their entirety
Insert: "Nutritionist" means:
(a) a person licensed under [this act];

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Helena, Mont.

Chairman.

House Bill 471
AMENDMENTS

(b) a person who has satisfactorily completed a baccalaureate and master's or a doctoral degree in the field of dietetics, food and nutrition, or public health nutrition conferred by an accredited college or university; or
(c) a person registered by the commission."

16. Page 3, line 15
Strike: "was"
Insert: "is"

17. Page 3, line 16, through page 4, line 14
Following: "commission" on line 16
Insert: "."
Strike: the remainder of line 16 and lines 17 through 25, page 3, and lines 1 through 13, page 4, in their entirety and line 14 through "dietitians."

18. Page 4, line 15
Strike: "dietetic"
Insert: "dietetic-nutrition"

19. Page 4, line 16
Following: line 15
Strike: " A licensed"
Insert: "Only a"
Following: "nutritionist"
Strike: "or licensed dietetics providers"
Insert: "can provide"

20. Page 5, line 5
Strike: "dietitian or a "
Insert: "licensed"

21. Page 5, line 8
Following: "is"
Strike: "a"
Following: "registered"
Strike: "dietitian"
Insert: "by the commission"

22. Page 5, line 9
Following: "from"

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Strike: "a regionally"
Insert: "an"

23. Page 5, line 12
Following: "nutrition,"
Insert: "or"
Following: "dietetics, or"
Strike: "food systems management or"

24. Page 5, line 15
Strike: "a regionally"
Insert: "an"

25. Page 5, line 17
Following: "and nutrition,"
Insert: "or"
Following: "dietetics"
Strike: the remainder of line 17 and line 18 through "management"

26. Page 5, line 18
Following: ";"
Insert: "and"

27. Page 5, line 20 through 22
Following: "practice"
Strike: "; and" on lines 20 and 21 through "commission" on line 22

28. Page 5, line 24
Following: "(1)"
Insert: "(b)"

29. Page 6, line 12
Strike: "dietetic"
Insert: "dietetic-nutrition"

30. Page 6, line 13
Strike: "dietetics"
Insert: "dietetics-nutrition"

31. Page 6, line 14
Strike: "dietitian"
Insert: "nutritionist"

Chairman.

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32. Page 6, line 19
Strike: "dietetics"
Insert: "dietetics-nutrition"

33. Page 6, line 24
Strike: "dietitian or"

34. Page 7, lines 7 and 8
Following: "and nutrition," on line 7
Insert: "or"
Following: "health nutrition" on line 7
Strike: ", or food service management"

35. Page 7, line 10
Strike: "dietetics"
Insert: "dietetics-nutrition"

36. Page 7, line 15 through 18
Following: "from" on line 15
Strike: the remainder of line 15, lines 16 and 17 in their entirety, and line 18 through "products"
Insert: "furnishing general nutritional information, including dissemination of literature, as to the use of food, food materials or dietary supplements or from engaging in the explanation as to the use of foods or food products, including dietary supplements, in connection with the marketing and distribution of those products."

37. Page 8, line 4
Strike: "a dietitian or"

38. Page 8, line 6
Strike: "dietitian or"

39. Page 8, line 9
Following: line 8
Strike: "dietitian, a"
Following: "nutritionist,"
Strike: ", a licensed dietitian,"

Chairman.

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Helena, Mont.

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AMENDMENTS

40. Page 8, line 11
Following: "act|"
Insert: "or exempted from licensure as defined in [section 6(5)]"

41. Page 8, line 13
Strike: "dietetics"
Insert: "dietetics-nutrition"

42. Page 8, line 16
Strike: "dietetics"
Insert: "dietetics-nutrition"

43. Page 9, line 7
Strike: "dietetics"
Insert: "dietetics-nutrition"

44. Page 9, line 11
Following: "for"
Strike: "licensed dietitians and"

45. Page 10, line 15
Strike: "registered dietitian"
Insert: "licensed nutritionist"

46. Page 10, line 22
Strike: "dietetics"
Insert: "dietetics-nutrition"

47. Page 10, line 25
Strike: "registered dietitian"
Insert: "licensed nutritionist"

48. Page 11, line 2
Strike: "dietitians and"

49. Page 11, lines 10, 11, and 12
Strike: New section|3 in its entirety

Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

February 9 19 87

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report HOUSE BILL NO. 473

☒ do pass
☐ do not pass

☐ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

REP. LES KITSELMAN Chairman

FIRST reading copy (WHITE color)

CLERICAL

Date: 2/9/87 House Bill 471

Time: 4:45 pm

In accordance with Joint Rule 3-7(b) the following clerical errors may be corrected:

House Committee on Business and Labor 2/9

Amendment #36

insert: "... food, food materials, or dietary supplements..."

Sponsor

4:07 pm 2-10-87

Secretary of Senate
or
Chief Clerk

MER

Legislative Council

STANDING COMMITTEE REPORT

February 9 19 87

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report HOUSE BILL NO. 471

☒ do pass ☐ be concurred in ☒ as amended
☐ do not pass ☐ be not concurred in ☐ statement of intent attached

REP. LES KITSELMAN Chairman

House Bill 471
AMENDMENTS

1. Page 1, line 5
Following: "NUTRITIONISTS"
Strike: "AND DIETITIANS"

2. Page 1, line 6
Strike: "DIETITIAN"
Insert: "NUTRITIONIST"

3. Page 1, lines 7 through 9
Following: "2-15-1841," on line 7
Strike: the remainder of line 7, line 8 in its entirety, and line 9 through "37-21-406,"

4. Page 1, line 14
Following: "assessment"
Strike: ","
Insert: "and"
Following: "counseling"
Strike: the remainder of line 14

5. Page 1, line 17
Strike: "and dietitions"

6. Page 1, line 18
Following: "welfare"
Strike: "and"
Insert: ","

7. Page 1, line 20
Following: "Montana"
Insert: ", and to provide a means of identifying those qualified to practice nutrition"

FIRST reading copy (WHITE color)

DATE 2/9/87
HB 475

STATE OF WASHINGTON
OFFICE OF THE GOVERNOR

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BOOTH GARDNER
GOVERNOR

RECEIVED APR 11 1986

April 4, 1986

To the Honorable, the Senate
of the State of Washington

Ladies and Gentlemen:

I am returning herewith, without my approval as to sections 1(4), 1(7) in part, 2 and 16, Engrossed Senate Bill 4620, entitled:

"AN ACT Relating to retail trading practices in the sale of motor vehicle fuels."

This legislation creates a separate franchise law that regulates the business relationship between motor fuel refiner-suppliers and motor fuel retailers.

The Legislature has devoted substantial time and effort to examining allegations that the major oil companies are employing predatory pricing and other unfair practices against the independent lessee-dealers to whom they supply gasoline and other products. These allegations are occurring during a period when the nature of retail gasoline marketing is undergoing significant changes. Preserving a market niche for independent lessee-dealers in this changing environment has been a major concern of the Legislature. Accordingly, Senate Resolution 1985-92 created a Select Committee to investigate these allegations and to submit its findings and recommendations to the Legislature. This legislation is largely a product of the Select Committee's work.

The Select Committee's findings are reflected in the major components of Engrossed Senate Bill No. 4620: (1) recognition and protection of lessee-dealers' franchise rights, (2) prohibitions against certain unfair trade practices and provision of legal remedies to address violations, (3) authorization for a study by the Attorney General to determine whether motor fuel refiner-suppliers are employing unfair price discrimination between their owner-operated retail outlets and their lessee-dealers in the wholesale price charged for fuel, and (4) prohibitions against motor fuel refiner-suppliers unfairly discriminating in the wholesale price of fuel charged to their motor-fuel retailers in the same five-mile marketing area.

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Evelyn Barnes says that she always felt like a gnat who Gulf was trying to brush away, but felt that she'd like to be a mosquito with a sting. Now after a momentus decision by the U.S. Court of Appeals, that Gulf violated her PMPA rights when it sold her station to a jobber without offering it to her first . . . Evelyn Barnes is no mere mosquito, she's a bee with a real big sting.

2/19/82
475

Evelyn Barnes: The Butterfly Who Became a Bee . . With a Sting

Evelyn Barnes is a pretty red-headed, widowed, ex-school teacher, who used to cry when he had to deal with an irate customer in her service station. However, when jobber Vernon Anderson called her at home where he was doing her laundry one day in July, 1985 and told her, "Lady, you're working for me now" and that he would soon tell her how she should run *his* station, which he had just bought from Gulf . . . she exploded.

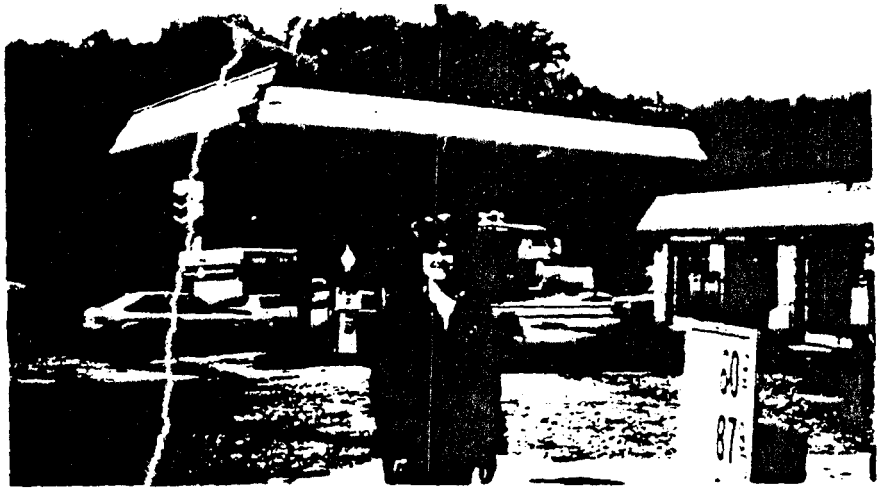
Evelyn says, "I was mad" and called her attorney Richard Bing who represents the Virginia Gasoline and Automotive Repair Association of which she is a member.

Evelyn who is an extrovert but still very much a lady, had every reason to be mad. She felt betrayed by Gulf who had promised her the first option to buy the station which she had run for six years.

Back in 1969, Evelyn and her husband Frank had been transfered to Triangle, Virginia where Frank was manager of a local bank. He decided to lease the station from Gulf in 1972.

Frank was a compulsive worker. He worked a seven-day week morning to night. One Sunday morning in July, 1979, Frank had been persuaded by Evelyn to stay home and take the family on a picnic. It was his first Sunday off in a year. That morning 40-year old Frank Barnes had a heart attack and died.

(Continued on pg. 47)



(Top) Evelyn Barnes enjoys waiting on customers. (Lower) Evelyn at her station.

than the new rent that the jobber had written into his proposed new lease.

After the Fourth Circuit rendered its opinion, Mrs. Barnes' attorney went back to the District Court to seek a preliminary injunction requiring Gulf (Chevron) and Anderson to perform under the same terms of the original franchise. The same judge, who was unanimously reversed by the Fourth Circuit, has refused to issue the injunction, claiming that the hardship to Chevron and the jobber was greater than that to her. Because of this, Mrs. Barnes has gone back to the Fourth Circuit to seek to have this decision reversed.

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In this decision, the court explicitly disagreed with the previous decisions, which allowed oil companies to circumvent dealers' right to purchase their station properties. It also expressly recognized the concept of constructive termination under PMPA. This refers to franchisor practices that would have the effect of **economically evicting** dealers.

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The Barnes case was argued before the Fourth Circuit for the first time in January, and in July the Fourth Circuit rendered the opinion that shocked the oil companies. The Fourth Circuit held that an assignment of a dealer's lease from a major to a jobber could constitute a constructive termination of the franchise. The court further said, in a footnote, that **overbearing franchisor conduct** could constitute a constructive termination.

This opinion has the potential to inject real life into PMPA. If you would like to join other dealers and contribute to the Barnes case, please fill out coupon and mail with check, any amount.

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Allied Aftermarket Division
East Providence, RI

Association Financial Services, Inc.
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[illegible], MA

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[illegible]

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Eden Prairie, MN

Hamilton Test Systems
Windsor, [illegible]

MoMMAES
[illegible]

NAPA
Atlanta, GA

Patch Rubber Company
[illegible]

Pepsi-Cola Company
[illegible]

Primrose Oil Company, Inc.
[illegible], TX

Reynolds & Reynolds
[illegible]

Trades [illegible]
[illegible]

U-Haul International
Phoenix, AZ

Wynn Oil Company
[illegible]

I WOULD LIKE TO CONTRIBUTE TO THE EVELYN BARNES DEFENSE FUND

NAME:

ADDRESS:

Please make checks payable to SSDA Legal Fund (Barnes)
Send to SSDA, [illegible] Pennsylvania Ave., SE, Washington, DC [illegible]

(Continued from pg. 12)

He left his wife with two children, Rich then 10 and Roy 4 years old

Gulf Discouraged Her from Trying to Run Station

The Gulf representative and the local jobber who supplied Gulf TBA to the Gulf dealers Vernon Anderson came to see her the day after the funeral. The Gulf rep told her that trying to take over the station herself would be a hard on her. He suggested that she should let Anderson the jobber take over the station. He gave her a month to think it over.

In the meantime, she did assume ownership of the station and kept thinking that if she didn't try to run the station herself, she'd always wonder if she could have done it.

Gulf agreed to give Evelyn a trial franchise which extended from August, 1979—August, 1980.

In that period, she learned the business and according to Hank Sprouse the station's mechanic, she emerged from being a school teacher who would hide behind the pumps rather than confront a customer, into a business women. In 1980, Gulf told her that her lease would not be renewed because the station was to be sold. Evelyn asked for a property appraisal and said that she wanted to buy the station. Later she was told that Gulf had changed its mind and she was sent a new lease and business continued as usual. Her lease was renewed again until 1985.

When Evelyn took over the business, she had two employees to pump gas, herself and Hank. Now she has six full time employees and four part time. One of the reasons for the additional help was the new muffler shop that she decided to open in August of 1981. She had wondered what she could do with a detached storage room on the premises. Evelyn, with Gulf's permission decided to convert it into a muffler specialty shop. Gulf said it was ok to go ahead with the improvements which she'd have to pay for.

Gulf Approved Improvements Made by Evelyn

Former district manager Vince Bruno allegedly told her, that if and when Gulf sold the premises she would have the right of first refusal and that any money she put into the improvements would eventually revert to her anyway.

Evelyn put in a new electric lift which is ideal for muffler work, bought an expensive pipe bender to create custom tail pipes and stocked a supply of mufflers and pipes and set up a separate operation. It has done well.

Repairs are important to Triangle Gulf, in fact a large amount of its revenue comes from its repair work. There are nine stations within a mile of the location which is about a half mile from the Quantico Marine base gates and gasoline sales are limited. Many of these stations however send their tough jobs to the station because Hank Sprouse is about the only mechanic around who goes regularly to the GM training school.

One of the big sources of revenue at the station is the U-Haul business and Evelyn proudly announced that she did $4,000 worth of rentals last week. Her commission is 15%. The station does not neglect its gasoline business either. It does about 40% of its volume at full-service where prices are about 20 cents a gallon above the self-serve island.

Today the station is strictly a neighborhood station. It once tried to increase volume by selling gasoline at five cents a gallon **below cost** with a rent subsidy from Gulf but only gained 4,000 gallons a month.

Vernon Anderson is a small jobber who supplies 35 stations. Of these he owns about 25. Anderson was also Gulf's TBA jobber and supplied strictly TBA to the directly supplied Gulf stations in the area. The Gulf dealers felt he took advantage of their captive customer status.

Sometimes Gulf sent a salesman around with Anderson. One once told Evelyn Barnes that he wanted a $10,000 TBA order from her or she would have "difficulty discussing her franchise."

TBA Sales Used as Lever on Lease Renewal

Back in September of 1984 she was told that if she wanted her lease renewed in two years she had better get rid of the Interstate batteries that she stocked and buy Gulf batteries. She did and found that the shelf life of some of the new Gulf batteries had already expired. Today Evelyn Barnes buys nothing from Vernon Anderson except the gas which he has supplied her with since Gulf now (Chevron) withdrew from the area. However, **she pays about 5 cents per gallon more for her regular leaded gas than she used to pay Chevron and up to 7 cents per gallon more for her super unleaded. This has made her uncompetitive and she has lost about 8-10,000 gallons per month in sales, as a result.**

New Lease is Tough

Vernon Anderson's new lease offer stipulated several things that would seriously affect the future of Evelyn Barnes' station. One was that he wanted to charge her additional rent for the muffler shop which she had rebuilt from the old storage shed practically from scratch at her own expense) and the other was he wanted no rental cars on the premises and no school buses. Evelyn's station has allowed four school buses from a nearby church school to park on the large station lot in the evenings. In return all four gas up each day at her pumps. Her early shift starts the bus motors at 6:30 a.m. each morning for the drivers to take them out and they do not return until that evening.

Evelyn has had a lot of support from her customers since they found out about her problems and many had offered to cut up their credit cards and send them back to Chevron in protest of the treatment that Evelyn has received.

Uncertainty and Legal Bills are a Headache

Her biggest concern has been the uncertainty which has accompanied her situation and the fact that she has been living on borrowed time since she was due to be evicted on February 14 of this year.

Since the verdict in the U.S. Fourth Circuit Court of Appeals in Richmond the pressure has been eased but she has still paid close to $40,000 in legal fees to keep the station. She says "We won't be spending much for Christmas this year."

In the meantime Vernon Anderson stays away from the station. There is no contact. Since the court injunction Evelyn pays the same that she did before the station was sold. This is nearly $700 a month less

EXHIBIT 4
DATE 2/9/87
HB 475

ATOM

Automotive Trades of Montana
P.O. Box 1238, Helena, MT 59624 • Phone: 442-6409

HB BILL NO. 475

NAME OF BILL: Gasoline Dealers Bill Of Rights

HIGHLIGHTS OF THE BILL:

A. Fair Competetion for Prohibition of Sale Of Franchise

   a. A motor fuel refiner-supplier or motor fuel reseller may not prohibit or unreasonably withhold its consent to any sale of franchise to a third party without fairly compensation.

B. Designation of Successor In Interest

   a. The interest of a motor-fuel retailer under the franchise is personal property and devolves on the death of the motor fuel retailer to a designated successor in interest of the retailer.

C. Right of First Refusal

   a. A motor fuel retailer has the right of first refusal to purchase the real estate or improvements or both within 30 days prior to the sale to any other buyer.

D. Motor Fuel Retailers Rights

   a. No motor fuel refiner-supplier or motor fuel reseller may require minimum sales volumes, alter any provision of the motor fuel franchise or set or compel the retail price at which the retailer sells motor fuel to the public.

E. Incorporation Of Motor Fuel Retailer Not Prohibited

   a. No motor fuel refiner-supplier or motor fuel reseller may prohibit the transfer of the franchise to a corporation in which the retailer maintains controlling interest.

than the new rent that the jobber had written into his proposed new lease.

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Hackettstown, NJ

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Roanoke Rapids, NC

Pepsi-Cola Company
White Plains, NY

Primrose Oil Company, Inc.
Dallas, TX

Reynolds & Reynolds
Dayton, OH

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Wynn Oil Company
Fullerton, CA

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Please make checks payable to: SSDA Legal Fund (Barnes)
Send to: SSDA, 304 Pennsylvania Ave., SE, Washington, DC 20003

tising service charge is granted to the over and above any discount, rebate, or advertising service charge availa- time of such transaction to said com- respect of a sale of goods of like ty, and quantity; to sell, or contract ods in any part of the United States lower than those exacted by said lsewhere in the United States for the of destroying competition, or eliminat- petitor in such part of the United to sell, or contract to sell, goods at bly low prices for the purpose of de- competition or eliminating a competi-

rson violating any of the provisions of on shall, upon conviction thereof, be more than $5,000 or imprisoned not n one year, or both.

1936, ch. 592, § 3, 49 Stat. 1528.)

CROSS REFERENCES

ion on non-profit institutions from provi- is section, see section 13c of this title.
nor, offense punishable by imprisonment ing one year as, see section 1 of Title 18, Criminal Procedure.

TION REFERRED TO IN OTHER SECTIONS

ion is referred to in title 10 section 7430; tion 1407; title 30 section 184; title 42 sec- title 49 section 10706

perative association; return of net earnings rplus

; in this Act shall prevent a coopera- iation from returning to its members, rs, or consumers the whole, or any part net earnings or surplus resulting from operations, in proportion to their r sales from, to, or through the as-

, 1936, ch. 592, § 4, 49 Stat. 1528.)

REFERENCES IN TEXT

referred to in text, is act June 19, 1936, ch. at. 1526, popularly known as the Robinson- ntidiscrimination Act and also as the Robin- n Price Discrimination Act, which enacted a, 13b, and 21a of this title and amended of this title. For complete classification of to the Code, see Short Title note set out tion 13 of this title and Tables.

CROSS REFERENCES

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mption of non-profit institutions from price nination provisions

g in the Act approved June 19, 1936, s the Robinson-Patman Antidiscrimina- shall apply to purchases of their sup- heir own use by schools, colleges, uni- public libraries, churches, hospitals, ritable institutions not operated for

1938, ch. 283, 52 Stat. 446.)

REFERENCES IN TEXT

The Act approved June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, referred to in text, is act June 19, 1936, ch. 592, 49 Stat. 1526, which enacted sections 13a, 13b, and 21a of this title and amended section 13 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 13 of this title and Tables.

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

(Oct. 15, 1914, ch. 323, § 3, 38 Stat. 731.)

CROSS REFERENCES

Administrative authority to enforce compliance with this section, see section 21 of this title.
Monopolizing trade, see section 2 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 21, 26 of this title.

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or th party, or either party's represent motions or asserted claims or lacking in merit as to show that s representative acted intentionall or otherwise acted in bad fai

(2) whether, in the course volved, such person or the opposi either party's representative, viol plicable rule, statute, or court ord for sanctions for dilatory behavi wise providing for expeditious and

(3) whether such person or party, or either party's repres gaged in conduct primarily for th delaying the litigation or increa thereof.

(b) Amount of damages payable to fore instrumentalities of foreign states

(1) Except as provided in paragr person who is a foreign state may under subsection (a) of this sectio in excess of the actual damages su and the cost of suit, including a r torney's fee.

(2) Paragraph (1) shall not appl state if—

(A) such foreign state woul under section 1605(a)(2) of title in a case in which the action is commercial activity, or an act, t ject matter of its claim under thi

(B) such foreign state waives based upon or arising out of i foreign state, to any claims brou in the same action;

(C) such foreign state engage commercial activities; and

(D) such foreign state with respect to the com the act, that is the subject matt under this section as a procure itself or for another foreign stat

(c) Definitions

For purposes of this section—

(1) the term "commercial have the meaning given it in s of title 28, and

(2) the term "foreign state" s meaning given it in section 1603

(Oct. 15, 1914, ch. 323, § 4, 38 Stat. 1980, Pub. L. 96-349, § 4(a)(1), Dec. 29, 1982, Pub. L. 97-393, 96 S

REFERENCES IN TEXT

The antitrust laws, referred to in s fined in section 12 of this title.

CODIFICATION

Section supersedes two former sin acted by act July 2, 1890, ch. 647, § 7, act Aug. 27, 1894, ch. 349, § 77, 28 which were restricted in operation act cited.

AMENDMENTS

1982—Subsec. (a). Pub. L. 97-393 d provisions as subsec. (a), and in subs nated, inserted "Except as provided of this section," at the beginning.

Labor. Sections 9 and 21 to 25 of the act were repealed by act June 25, 1948, ch. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948, and their provisions are now covered by sections 402, 660, 3285 and 3691 of Title 18, Crimes and Criminal Procedure, except that former section 23 of the act is obsolete and not now covered. Sections 17 to 19 of the act were repealed by act June 25, 1948, ch. 646, § 39, 62 Stat. 992, eff. Sept. 1, 1948, and their provisions are now covered by rule 65 of the Federal Rules of Civil Procedure, Title 28, Appendix, Judiciary and Judicial Procedure. For complete classification of this Act to the Code, see Tables.

CODIFICATION

The 3d par. of subsec. (a) is also classified to section 53 of Title 29, Labor.

AMENDMENTS

1976—Pub. L. 94-435 designated existing provisions as subsec. (a) and added subsec. (b).

CROSS REFERENCES

Federal Aviation Act of 1958, antitrust exemption under, see section 1384 of Title 49, Appendix, Transportation.

Insurance business, applicability of sections 12 to 27 to, see section 1011 et seq. of this title.

CLAYTON ACT REFERRED TO IN OTHER SECTIONS

The Clayton Act [see References in Text note to this section] is referred to in sections 44, 1012, 1013, 3301, 3503 of this title; title 7 section 225; title 10 section 7430; title 12 sections 1828, 1849, 3208; title 16 section 2602; title 30 sections 184, 1413; title 33 sections 1331, 1502; title 40 section 488; title 42 sections 2135, 5417, 5909, 6202, 8235f, 9102; title 43 section 1770; title 45 section 791; title 49 section 10706; title 50 App. sections 1941a, 2158.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1291, 1311, 4002, 4021 of this title; title 19 sections 2033, 2561; title 28 section 1407; title 42 section 8775; title 46 section 885; title 49 sections 10706, 10708, 10934, 11110; title 49 App. sections 1301, 1384.

§ 13. Discrimination in price, services, or facilities

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the

Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or acceptance of commission, brokerage or other compensation

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for services or facilities for processing or sale

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such

w[illegible] has been driven under its own power, pushed, towed, or propelled by any other means to sufficiently identify it from other new vehicles that have not been driven, pushed, or towed and shall be required to furnish the purchaser of any such motor vehicle with a certificate, on a printed form to be furnished by the department upon request by such dealers, showing the actual number of miles the motor vehicle has been driven under its own power and the number of miles the vehicle has been pushed, towed, or otherwise propelled upon its own wheels. Any firm, person, corporation, or association or any of their employees who fails to prominently label and issue the certificate or who knowingly issue a certificate that is untrue and calculated to mislead the purchaser is guilty of a misdemeanor.

(2) The provisions of this section do not apply to motor vehicles during the period of time that such motor vehicles are used for bona fide demonstrating purposes.

History: En. Secs. 1, 2, Ch. 26, L. 1937; R.C.M. 1947, 53-301, 53-302; amd. Sec. 49, Ch. 421, L. 1979; amd. Sec. 1, Ch. 503, L. 1985.

Compiler's Comments

1985 Amendment: In first sentence of (1) substituted reference to department of justice for reference to division of motor vehicles.

Cross-References

Classification of offenses, 45-1-201.

"Misdemeanor" defined, 45-2-101.

Misdemeanor — no penalty specified, 46-18-212.

Permit and transit plates for new vehicles being transported by driveaway or towaway methods, 61-4-301.

61-4-114 through 61-4-118. Repealed. Sec. 6, Ch. 39, L. 1981.

Compiler's Comments

Histories of Repealed Sections:

61-4-114. (1)En. Sec. 1, Ch. 209, L. 1971; Sec. 53-118.6, R.C.M. 1947; amd. and redes. 32-3315.1 by Sec. 168, Ch. 316, L. 1974; Sec. 32-3315.1, R.C.M. 1947; (2)En. Sec. 12, Ch. 219, L. 1951; amd. Sec. 1, Ch. 262, L. 1967; amd. Sec. 1, Ch. 46, L. 1973; Sec. 53-626, R.C.M. 1947; amd. and redes. 32-3319 by Sec. 183, Ch. 316, L. 1974; Sec. 32-3319, R.C.M. 1947; R.C.M. 1947, 32-3315.1, 32-3319(part); amd. Sec. 50, Ch. 421, L. 1979.

61-4-115. Ap. p. Sec. 2, Ch. 209, L. 1971; Sec. 53-118.7, R.C.M. 1947; amd. and redes. 32-3315.2 by Sec. 169, Ch. 316, L. 1974; Sec. 32-3315.2, R.C.M. 1947; Ap. p. Sec. 13, Ch. 219, L. 1951; Sec. 53-627, R.C.M. 1947; amd. and redes. 32-3320 by Sec. 184, Ch. 316, L. 1974; Sec. 32-3320, R.C.M. 1947; R.C.M. 1947, 32-3315.2, 32-3320(part).

61-4-116. En. Sec. 3, Ch. 209, L. 1971; Sec. 53-118.8, R.C.M. 1947; amd. and redes. 32-3315.3 by Sec. 170, Ch. 316, L. 1974; R.C.M. 1947, 32-3315.3.

61-4-117. En. Sec. 4, Ch. 209, L. 1971; Sec. 53-118.9, R.C.M. 1947; amd. and redes. 32-3315.4 by Sec. 171, Ch. 316, L. 1974; R.C.M. 1947, 32-3315.4.

61-4-118. En. Sec. 5, Ch. 209, L. 1971; Sec. 53-118.10, R.C.M. 1947; amd. and redes. 32-3315.5 by Sec. 172, Ch. 316, L. 1974; R.C.M. 1947, 32-3315.5.

61-4-119. Penalty. Any person violating the provisions of 61-4-111 or 61-4-112 is guilty of a misdemeanor and subject to a fine of not less than $25 and not more than $100. Every violation of 61-4-111 and 61-4-112 is considered a separate offense.

History: En. Sec. 2, Ch. 118, L. 1981.

Cross-References

Classification of offenses, 45-1-201.

"Misdemeanor" defined, 45-2-101.

61-4-120 through 61-4-130 reserved.

61-4-131. Definitions. As used in 61-4-131 through 61-4-137, the following definitions apply:

(1) "Department" means the department of commerce.

(2) "Designated family member" means the spouse, child, grandchild, parent, brother, or sister of a dealer who, in the case of a deceased dealer, is entitled to inherit the dealer's ownership interest in the dealership under the terms of the dealer's will, or who has otherwise been designated in writing by a deceased dealer to succeed him in the motor vehicle dealership, or under the laws of intestate succession of this state or who, in the case of an incapacitated dealer, has been appointed by a court as the legal representative of the dealer's property. The term includes the appointed and qualified personal representative and the testamentary trustee of a deceased dealer.

History: En. 51-609 by Sec. 1, Ch. 381, L. 1977; R.C.M. 1947, 51-609(1), (3); amd. Sec. 2, Ch. 274, L. 1981.

Compiler's Comments

1981 Amendment: Substituted "department of commerce" for "department of business regulation" in (1).

Cross-References

Department of Commerce, 2-15-1801.

Estates, Trusts, and Fiduciary Relationships, Title 72.

61-4-132. Right of designated family member to succeed in dealership ownership. (1) Any designated family member of a deceased or incapacitated dealer may succeed the dealer in the ownership or operation of the dealership under the existing franchise or distribution agreement provided he gives the manufacturer, factory branch, distributor, or importer of new motor vehicles written notice of his intention to do so within 120 days of the dealer's death or incapacity and unless there exists good cause for refusal to honor such succession on the part of the manufacturer, factory branch, distributor, or importer.

(2) The manufacturer, factory branch, distributor, or importer may request, and the designated family member shall provide, upon request, personal and financial data that is reasonably necessary to determine whether the succession should be honored.

History: En. 51-610 by Sec. 2, Ch. 381, L. 1977; R.C.M. 1947, 51-610.

61-4-133. Refusal to honor succession to ownership — notice required. (1) If a manufacturer, factory branch, distributor, or importer believes that good cause exists for refusing to honor the succession to the ownership and operation of a dealership by a family member of a deceased or incapacitated dealer under the existing franchise agreement, the manufacturer, factory branch, distributor, or importer may, within 30 days of receipt of notice of the designated family member's intent to succeed the dealer in the ownership and operation of the dealership, serve upon the designated family member and the department notice of its refusal to honor the succession and of its intent to discontinue the existing franchise agreement with the dealership no sooner than 60 days from the date such notice is served.

(2) The notice must state the specific grounds for the refusal to honor the succession and of its intent to discontinue the existing franchise agreement with the dealership no sooner than 60 days from the date such notice is served.

(3) If notice of refusal and discontinuance is not timely served upon the family member and the department or if the department rules in favor of the complainant in a hearing held pursuant to 61-4-134, the franchise agreement

shall continue in effect subject to termination only as otherwise permitted by law.

History: En. 51-611 by Sec. 3, Ch. 381, L. 1977; R.C.M. 1947, 51-611.

Cross-References

Notice — actual and constructive, 1-1-217.
Notice, 2-4-601.
Canceled dealership contracts — repurchase requirements, Title 30, ch. 11, part 7.
Unfair trade practices generally, Title 30, ch. 14, part 2.

61-4-134. Procedure to determine right to succeed. (1) Any designated family member who receives notice of the manufacturer's, factory branch, distributor's, or importer's refusal to honor his succession to the ownership and operation of the dealership may, within the 60-day period, file with the department a verified complaint for a hearing and determination by the department on whether good cause exists for refusal and discontinuance.

(2) The manufacturer, factory branch, distributor, or importer must establish good cause for refusal by showing that the succession would be detrimental to the public interest or to the representation of the manufacturer, factory branch, distributor, or importer.

(3) The franchise agreement shall continue in effect until the final determination of the issues raised in the complaint.

(4) If the manufacturer, factory branch, distributor, or importer prevails, the department shall include in its order approving the termination of the franchise agreement reasonable conditions affording the complainant an opportunity to receive fair and reasonable compensation for the value of the dealership.

(5) Any decision by the department may be reviewed pursuant to part 7, chapter 4, Title 2.

History: En. 51-612 by Sec. 4, Ch. 381, L. 1977; R.C.M. 1947, 51-612.

Cross-References

Contested cases, Title 2, ch. 4, part 6.

61-4-135. Written designation of succession unaffected. Sections 61-4-131 through 61-4-137 do not preclude a dealer from designating any person as his successor by written instrument filed with the manufacturer, factory branch, distributor, or importer.

History: En. 51-613 by Sec. 5, Ch. 381, L. 1977; R.C.M. 1947, 51-613.

61-4-136. Violation — penalty. Any person violating the provisions of 61-4-131 through 61-4-137 shall upon conviction be fined no more than $5,000.

History: En. 51-614 by Sec. 6, Ch. 381, L. 1977; R.C.M. 1947, 51-614.

61-4-137. Civil damages. Any dealer suffering pecuniary loss due to a violation of 61-4-131 through 61-4-137, upon prevailing in a civil action therefor, is entitled to damages equal to three times the pecuniary loss together with court costs and reasonable attorneys' fees.

History: En. 51-615 by Sec. 7, Ch. 381, L. 1977; R.C.M. 1947, 51-615.

Cross-References

When exemplary damages allowed, 27-1-221.
Measure of damages, Title 27, ch. 1, part 3.

Part 2

Licensing of New Motor Vehicle Manufacturers, Distributors, and Importers

Part Cross-References

Canceled dealership contracts — repurchase requirements, Title 30, ch. 11, part 7.

61-4-201. Definitions. As used in this part, the following definitions apply:

(1) "Community" means the relevant market area of a franchise. For the purposes of this part, the relevant market area of a franchise is the county or counties in which the franchisee is located.

(2) "Department" means the department of justice.

(3) "Distributor" or "wholesaler" means a person who sells or distributes new motor vehicles to new motor vehicle dealers in this state or who maintains distributor representatives in this state.

(4) "Distributor branch" means a branch office maintained or availed of by a distributor or wholesaler for the sale of new motor vehicles to new motor vehicle dealers in this state for directing or supervising its representatives in this state.

(5) "Factory branch" means a branch office maintained or availed of by a manufacturer for the sale of new motor vehicles to distributors or for the sale of new motor vehicles to new motor vehicle dealers in this state or for directing or supervising its representatives in this state.

(6) "Franchise" means a contract between or among two or more persons when all of the following conditions are included:

(a) a commercial relationship of definite duration or continuing indefinite duration is involved;

(b) the franchisee is granted the right to offer, sell, and service in this state new motor vehicles manufactured or distributed by the franchisor;

(c) the franchisee, as a separate business, constitutes a component of franchisor's distribution system; and

(d) the operation of the franchisee's business is substantially reliant on the franchisor for the continued supply of new motor vehicles, parts, and accessories.

(7) "Franchisee" means a person who receives new motor vehicles from the franchisor under a franchise and who offers, sells, and services such new motor vehicles to and for the general public.

(8) "Franchisor" means a person who manufactures, imports, or distributes new motor vehicles and who may enter into a franchise.

(9) "Importer" means a person who transports or arranges for the transportation of a foreign manufactured new motor vehicle into the United States for sale in this state.

(10) "Manufacturer" means a person who manufactures or assembles new motor vehicles or who manufactures or installs on previously assembled truck chassis special bodies or equipment, which when installed form an integral part of the new motor vehicle and which constitutes a major manufacturing alteration, but does not include a person who installs a camper on a pickup truck.

Independent dealers battled ARCO in '86

By Julie Penn
Review-Journal

The Nevada Gasoline Retailers Association made headlines in 1986 for its claims that the Atlantic Richfield Corp. is leading the other major oil companies in the West on the warpath against their independent dealers.

Jack Greco, spokesman for the association, led the battle against the oil companies which he claimed were trying to eliminate their middlemen, the members of the NGRA. And, the NGRA called for a divorcement law to be enacted in the coming year's state legislature which would make it illegal for oil companies to operate on the retail level, thus eliminating company-operated convenience stores such as ARCO's AM/PM Mini Markets.

But that wasn't all. The NGRA accused ARCO of attempting to monopolize the Las Vegas market with a goal of controlling prices at the pumps.

Greco claimed ARCO and the other oil companies have joined forces to drive out the small independent stations.

ARCO spokesmen deny the accusations and plan to oppose the divorcement bill. Ed Reilly, ARCO senior vice president of marketing, said ARCO has only been responding to consumer demands with its emphasis on self-serve stations and AM/PMs. Reilly said company operated AM/PMs were less expensive to run and that Prestige Station Inc., a wholly owned subsidiary of ARCO, was able to operate these stations without the use of dealers.

ARCO wasn't alone in taking a new direction in 1986.

Three of the other major oil companies with outlets in Las Vegas are following ARCO's lead and are placing emphasis on self-serve pumps and convenience stores. The major five oil companies represented in Las Vegas are ARCO, Chevron, Exxon, Texaco and Unocal.

ARCO spokesmen said the oil companies are doing nothing wrong except listening to customer needs for inexpensive gasoline and responding to those desires.

"We believe that most people buy gasoline because of price and price alone," Reilly said in late October.

ARCO began the recent downward trend in gasoline prices in February, and was first major oil company to reflect the low price of oil at the pumps. Three years ago ARCO

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Gasoline

From 1AA

dropped its credit card to lower the price of gasoline by three cents and Reilly said consumers responded to ARCO's low prices by moving the company from fourth place to the No. 1 oil company on the West Coast.

ARCO currently has a 18 percent share of the California market where it has the most stations, and an 18 percent share of the Nevada market. There are now 49 ARCO brand stations in the Las Vegas area, 27 of which are company-operated.

ARCO has experienced tremendous growth in the Las Vegas market during the past two years. In 1984, it had only 10 local stations, all of which were operated by independent dealers. In June 1984, six of those dealers converted their stations to AM/PM Mini Markets. Within a year, there were 27 ARCO stations in Las Vegas and in August 1985, ARCO traded 27 of its stations in Illinois for 18 Shell brand stations in the West (15 of those were in Nevada).

Shell dealers in Las Vegas were given the choice of switching to ARCO or selling their station to Shell Oil Co. for $50,000. Three accepted Shell's offer, three signed on with ARCO and the rest initiated a lawsuit against ARCO and Shell in an attempt to stop the deal.

The lawsuit against Shell and ARCO is still pending with the former Shell dealers seeking a jury trial. And those former Shell dealers are now active in NGRA and its fight for divorcement bill and also a dealers' bill of rights that would give dealers a few more freedoms in dealing with the oil companies.

In early October, Southern Nevada gasoline retailers signed up to join the NGRA for the first time during a dealers' meeting which was called to examine the problem they were having with ARCO and the other oil companies. At that meeting Greco encouraged those signing up for NGRA membership to tell their customers about their concern and also to put signs at their stations which read "How Much Will You Pay For A Gallon Of Gas? Don't Let Big Oil Take Your Shirt."

Throughout October, November and December, members of NGRA met with legislators and public officials stressing their concern and lobbying for the introduction of open supply and divorcement bills in the state legislature.

ARCO fought back. In late October, ARCO officials flew two executives from its Southern California headquarters to Las Vegas to tell members of the media and public officials their side of the story. Most recently, ARCO has begun television advertising in the Las Vegas market touting its new PayPoint Electronic Cashier System, which allows customers to use their bank's automatic teller machine cards to purchase gasoline and convenience store items on a direct debit system.

Greco said that 1987 will be a time of gathering documents that support NGRA claims.

"We'll also be making sure there is a high level of public awareness and showing the public what will happen if the bill does not pass," Greco said.

Evelyn Barnes says that she always felt like a gnat who Gulf was trying to brush away, but felt that she'd like to be a mosquito with a sting. Now after a momentus decision by the U.S. Court of Appeals, that Gulf violated her PMPA rights when it sold her static to a jobber without offering it to her first . . . Evelyn Barnes is no mere mosquito, she's a bee with a real big sting.

Evelyn Barnes: The Butterfly Who Became a Bee . . With a Sting

Evelyn Barnes is a pretty red-headed, widowed, ex-school teacher, who used to cry when she had to deal with an irate customer in her service station. However, when jobber Vernon Anderson called her at home where she was doing her laundry one day in May, 1985 and told her, "Lady, you're working for me now" and that he would soon tell her how she should run *his* station, which he had just bought from Gulf . . . she exploded.

Evelyn says, "I was mad" and called her attorney Richard Bing who represents the Virginia Gasoline and Automotive Repair Association of which she is a member.

Evelyn who is an extrovert but still very much a lady, had every reason to be mad. She felt betrayed by Gulf who had promised her the first option to buy the station which she had run for six years.

Back in 1969, Evelyn and her husband Frank had been transfered to Triangle, Virginia where Frank was manager of a local bank. He decided to lease the station from Gulf in 1972.

Frank was a compulsive worker. He worked a seven-day week morning to night. One Sunday morning in July, 1979, Frank had been persuaded by Evelyn to stay home and take the family on a picnic. It was his first Sunday off in a year. That morning 40-year old Frank Barnes had a heart attack and died.

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(Top) Evelyn Barnes enjoys waiting on customers. (Lower) Evelyn at her station.

(Continued from pg. 12)

He left his wife with two children, Rich then 16 and Roy 4 years old.

Gulf Discouraged Her from Trying to Run Station

The Gulf representative and the local jobber who supplied Gulf TBA to the Gulf dealers, Vernon Anderson, came to see her the day after the funeral. The Gulf rep told her that trying to take over the station herself would be a hard on her. He suggested that she should let Anderson, the jobber, take over the station. He gave her a month to think it over.

In the meantime, she did assume ownership of the station and kept thinking that if she didn't try to run the station herself, she'd always wonder if she could have done it.

Gulf agreed to give Evelyn a trial franchise which extended from August, 1979—August, 1980.

In that period, she learned the business and according to Hank Sprouse the station's mechanic, she emerged from being a school teacher who would hide behind the pumps rather than confront a customer, into a business women. In 1980, Gulf told her that her lease would not be renewed because the station was to be sold. Evelyn asked for a property appraisal and said that she wanted to buy the station. Later she was told that Gulf had changed its mind and she was sent a new lease and business continued as usual. Her lease was renewed again until 1985.

When Evelyn took over the business, she had two employees to pump gas, herself and Hank. Now she has six full-time employees and four part-time. One of the reasons for the additional help was the new muffler shop that she decided to open in August of 1983. She had wondered what she could do with a detached storage room on the premises. Evelyn, with Gulf's permission, decided to convert it into a muffler specialty shop. Gulf said it was ok to go ahead with the improvements, which she'd have to pay for.

Gulf Approved Improvements Made by Evelyn

Former district manager Vince Bruno allegedly told her, that if and when Gulf sold the premises she would have the right of first refusal and that any money she put into the improvements would eventually revert to her anyway.

Evelyn put in a new electric lift which is ideal for muffler work, bought an expensive pipe bender to create custom tail pipes and stocked a supply of mufflers and pipes and set up a separate operation. It has done well.

Repairs are important to Triangle Gulf, in fact a large amount of its revenue comes from its repair work. There are nine stations within a mile of the location, which is about a half mile from the Quantico Marine base gates and gasoline sales are limited. Many of these stations however, send their tough jobs to the station because Hank Sprouse is about the only mechanic around who goes regularly to the GM training school.

One of the big sources of revenue at the station is the U-Haul business and Evelyn proudly announced that she did $4,000 worth of rentals "last week." Her commission is 15%. The station does not neglect its gasoline business either. It does about 40% of its volume at full-service where prices are about 20 cents a gallon above the self-serve island.

Today the station is strictly a neighborhood station. It once tried to increase volume by selling gasoline at five cents a gallon **below cost,** (with a rent subsidy from Gulf) but only gained 4,000 gallons a month.

Vernon Anderson is a small jobber who supplies 35 stations. Of these he owns about 25. Anderson was also Gulf's TBA jobber and supplied strictly TBA to the directly supplied Gulf stations in the area. The Gulf dealers felt he took advantage of their captive-customer status.

Sometimes Gulf sent a salesman around with Anderson. One once told Evelyn Barnes that he wanted a $10,000 TBA order from her or she would have "difficulty discussing her franchise."

TBA Sales Used as Lever on Lease Renewal

Back in September of 1983, she was told that if she wanted her lease renewed in two years, she had better get rid of the Interstate batteries that she stocked and buy Gulf batteries. She did and found that the shelf-life of some of the new Gulf batteries had already expired. Today, Evelyn Barnes buys nothing from Vernon Anderson except the gas which he has supplied her with since Gulf, now Chevron, withdrew from the area. **However, she pays about 5 cents per gallon more for her regular leaded gas than she used to pay Chevron and up to 11 cents per gallon more for her super unleaded. This has made her uncompetitive and she has lost abou 8-10,000 gallons per month in sales, as a result.**

New Lease is Tough

Vernon Anderson's new lease offer stipulated several things that would seriously affect the future of Evelyn Barnes' station. One was that he wanted to charge her additional rent for the muffler shop which she had rebuilt from the old storage shed practically from scratch, (at her own expense) and the other was he wanted no rental cars on the premises and no school buses. Evelyn's station has allowed four school buses from a nearby church school to park on the large station lot in the evenings. In return, all four gas up each day at her pumps. Her early shift starts the bus motors at 6:30 a.m. each morning for the drivers to take them out and they do not return until that evening.

Evelyn has had a lot of support from her customers since they found out about her problems and many had offered to cut up their credit cards and send them back to Chevron in protest of the treatment that Evelyn has received.

Uncertainty and Legal Bills are a Headache

Her biggest concern has been the uncertainty which has accompanied her situation and the fact that she has been living on borrowed time since she was due to be evicted on February 13 of this year.

Since the verdict in the U.S. Fourth Circuit Court of Appeals in Richmond, the pressure has been less, but she has still paid close to $40,000 in legal fees to keep her station. She says, "We won't be spending much for Christmas this year."

In the meantime, Vernon Anderson stays away from the station. There is no contact. Since the court injunction, Evelyn pays the same rer that she did before the station was sold. This is nearly $700 a month less

It could have happened to any dealer. You go to your station one morning and find a local jobber scurrying about the premises. Since you are supplied directly by a major oil company, you wonder what business the jobber has at your station.

When Your Local Jobber Tells You He Has Just Bought Your Station, You Don't Roll Over and Play Dead

Your jobber has just triumphantly announced that he has bought your station and that you now work for him. You wonder if whatever happened to your right of first refusal under PMPA? This jobber is really into company-operated C-stores, how long can I last with him?

Missouri dealer, Jack Felts, found himself in this situation in April of 1985. Rather than roll over and play dead, he decided to fight this transaction and contacted his attorney Jim Wyrsch.

Wyrsch went to Federal Court in Kansas City in an effort to get an injunction under PMPA preventing the assignment of Felts' franchise to the jobber and the sale of Amoco's interests in the leased marketing premises. The suit further sought a declaratory judgement to force Amoco to offer Felts the right to purchase his station.

An interesting twist in this case was provided by the fact that Amoco did not own the property, rather it had a third-party lease. Nevertheless, when a dealer is terminated or non-renewed because of the sale of his station, he is entitled to a right of first refusal to purchase the franchisor's interest in the leased marketing premise. Because PMPA requires the franchisor to sell all of its interests, it does not matter that the franchisor does not own the property. PMPA simply requires the sale to the dealer of whatever the franchisor owns.

In Felts' situation, Amoco attempted an end run around PMPA which it had successfully tried in the Iowa case of ***Aldrich vs. Amoco***. Amoco argued that its assignment of Felts' franchise to the jobber gave the dealer no cause of action under PMPA.

In its brief, Amoco contended that the assignment and sale represented "a change in Amoco's distribution system with which Felts had no legitimate right to interfere."

Amoco's End-Run Around PMPA . . . No Termination Took Place

Amoco's position was that Felts' franchise had not been terminated, rather it had been assigned. It further stated that Felts had no right of first refusal because the franchise relationship, which PMPA defines as the ongoing business relationship, had not been non-renewed.

This was because a non-renewal of a PMPA franchise relationship by definition, must be preceded by a termination of the specific franchise. Because the franchise had been assigned, not terminated, Amoco argued that there was no non-renewal as a matter of law; therefore, Felts had no right of first refusal. In fact, Amoco contended it was "business as usual" at Felts' station, and he was in fact better off with the jobber because he had "two parties to look to for performance."

Dealers Had Never Won

Unfortunately, in several other cases including ***McGee vs. Gulf*** (Albama), ***Weatherford vs. Gulf*** (Tennessee) and ***Aldrich vs. Amoco*** (Iowa), the courts bought the "business as usual" argument and dismissed the dealers claim. In fact, dealers had not won a case on the assignment and sale issue when Felts brought his case.

Shortly after going to U.S. District Court, Felts' attorney Jim Wyrsch received an opinion which denied the dealer's motion for a preliminary injuction, but also denied Amoco's motion for a summary judgement due to a factual question as to whether the dealer supply contract was assignment. Nevertheless, the opinion made it clear that the district court had bought the "business as usual" argument, and went so far as to say that if Amoco clearly assigned the dealer supply contract, it would discuss the case. The court did not rule on the declaratory judgement count seeking the right of first refusal.

With his client's livlihood

(Continued on pg. 63)

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(Continued from pg. 35)

threatened, Wyrsch appealed the denial of the preliminary injunction in the **Eigth Circuit Court of Appeals.** He also requested SSDA's assistance in the case, and requested that SSDA file an amicus curare or friend of the court brief.

SSDA Amicus Brief Sought to Educate the Court

The threshold issue facing Wyrsch and SSDA was getting past the business as usual argument and establishing that there had been a constructive termination of Felts' franchise. A further problem was presented by the fact that the courts had been uniformily hostile to the concept of "constuctive termination."

In its amicus brief by staff attorney Jim Daskal, SSDA decided that the court would need educating as to the fundamentals of the gasoline marketing industry. It was critical that the court understood the differences between direct and jobber supply, and why a dealer would prefer to deal directly with a major rather than with a jobber. Many judges did not even know what a jobber was.

It was further necessary to extensively educate the court as to the legislative history of PMPA, particularly as it regarded assignments and sales of stations. SSDA's research into the legislative history brought out two critical points.

First, with regard to assignments, the legislative history indicated that PMPA's provision leaving assignments to state law was included at the request of major oil companies to include provisions in PMPA denying the dealer a right to assignment under state law. It further showed that Congress did not intend to allow assignments that would create loopholes in PMPA.

SSDA contended that this is precisely what would happen if the court allowed the assignment to stand. **It would create a loophole which would allow oil companies to destroy the dealers' right to first refusal.**

Amoco Opposed SSDA Intervention

Amoco violently opposed SSDA's intervention in the case, and demeaned SSDA arguments in the brief.

In its brief, Amoco stated that, "the courts should not succumb to the SSDA's attempts to lobby the court into amending PMPA without the intervention of Congress." Amoco further stated that, "SSDA's arguments concedes *sub silent* (without actually saying it) that Amoco's position is the one dictated by the express language of PMPA; it asks, in effect, that the court lighten its lobbying burden by amending the statute without the inconvenience or delay in having Congress do so, as the Constitution requires."

Oral argument occurred on January 17, 1986 in St. Louis with SSDA's Daskal and attorney Wyrsch both participating. **Only three weeks later, the Court rendered its opinion.**

The decision shocked Amoco attorneys who had expressed confidence bordering on cockiness.

The Eighth Circuit expressly held that Amoco's actions could indeed constitute a constructive termination of Felts' franchise and ordered the parties be returned to the status quo that existed prior to the assignment and sale. In other words, Amoco was forced to buy back its interests in the property and resume direct supply of Felts several months after the transaction occurred.

Unfortunately, because the district court had not ruled on the motion for a declaratory judgement declaring Felts right to purchase the property, the Eighth Circuit could not specifically order it.

Amoco Settled With Felts to Cut Losses

To avoid a total rout, Amoco settled with Felts, allowing him to remain in the station and paying him substantial damages.

Felts vs. Amoco nevertheless remains a landmark decision. First, it represented the first time a federal appeals court had recognized constructive termination under PMPA. Secondly, it was the **first dealer victory** on the issue of whether an assignment can be used to circumvent the dealer right of first refusal.

The *Felts* precedent will prove very important to dealers across the country, particularly those affected by the **Chevron-Cumberland Farms**, and other other large scale efforts to subvert the dealer right of first refusal.

il rep
ges
iation

"We are at war and people like this

Karl Hemsley, a former Mobil Oil Corporation marketing representative, has filed suit in Los Angeles Superior Court alleging that the company fired him in August of 1983 in retaliation for his refusal to violate state and federal anti-price fixing, product safety and unfair competition laws. The suit asks for punitive damages of $100 million.

Hemsley attached over 200 pages of purported internal company memoranda to his 68-page complaint. He was also joined as a co-plaintiff by his wife Janell Hemsley, who asserted that the emotional distress she suffered as a result of Mobil's treatment of her husband caused her serious medical problems.

Mobil employed Hemsley in its southern California marketing department as a sales representative from 1970 to 1983. In his suit, he claimed he was fired because he refused to commit acts he alleged were unlawful.

Janell and Karl Hemsley have joined in a 100-million lawsuit against Mobil Oil. Hemsley, a former marketing rep, claims the company fired him for refusing to violate federal and state laws.

A Mobil spokesman said the company denied all charges made in the suit. "There is no truth to the charges, and Mobil regularly briefs employes on antitrust matters," the spokesman said.

Mobil filed for a change of venue in early September, moving the case to Los Angeles federal court. If granted, the request would extend Mobil's deadline for formally responding to the suit until late last month, said the spokesman, noting the length and complexity of the lawsuit.

A letter to Hemsley from Mobil western resale marketing manager, M. D. DiMezza, states that Hemsley was "terminated for non-performance of job responsibilities" after failing to show improvement after being on probation. Hemsley was placed on probation three times and demoted twice during his latter years at Mobil.

Hemsley cited as particularly repugnant to his personal moral convictions (he is a Mormon) the

and asserted he was present when Lingle made anti-Semitic remarks to the dealer, who later retained a lawyer to protest Lingle's remarks to Mobil management. This prompted a written denial of any racial prejudice from Mobil region manager, R. J. Niermeyer. Hemsley maintained his attempts to stand up for the dealer's rights was a material factor in Mobil's decision to fire him.

In support of his allegations that

accountable to management for dealer postings in their assigned territories and were required to report daily on their success in controlling prices.

Attached to his complaint are copies of what Hemsley contended were

club" for reps who got their dealers to break the dollar price barrier by selling several cents below dealer cost.

Hemsley claimed that Mobil ordered him to sell huge amounts of TBA to his dealers and to terminate those who would not buy for "weeds in the planter" or "no toilet paper in the restrooms." When the company dropped its TBA program, Hemsley said they used similar tactics to force dealers to buy excessive quantities of motor oil, overstocking some dealers to the point where they had to convert restrooms to oil storage.

Prior to his termination, Hemsley detailed his claims of the company's illegal practices in a 28-page letter to Mobil's board chairman, president, and regional manager, offering to submit proof of his allegations and at one point to take a lie detector test. He said Mobil declined to investigate his claims or to correct the unlawful practices and decided to fire him instead.

The former Mobil employe said once it became apparent that he refused to risk criminal prosecution to achieve his assigned objectives, he was subjected to verbal abuse, insertion of poor job performance evaluations in his personal file, and unfair manipulation of his work assignment, all designed to force him to quit or to follow the company line.

In her suit, Mrs. Hemsley contended that Mobil's treatment of her husband nearly destroyed their family life and created unbearable emotional distress, resulting in serious medical problems and impairment of her ability to care for their four small children.

The Hemsleys are represented in their suit by Anaheim attorneys Richard P. Carroll and James R. Carroll (author of *SSM*'s monthly "Legal Corner" column). The Carrolls handled the landmark 1980 case, Tameny Vs. Atlantic Richfield Co., in which the California Supreme Court ruled that the fact that an employer may be able to discharge an employe for no reason at all does not protect the employer from charges that he fired an employe for refusing to break the law. Δ

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LEGAL CORNER

by James Carroll, Attorney-At-Law

Hemsley suit contains lessons for dealers

James Carroll practices law in Anaheim, California. His three-attorney firm specializes in petroleum marketing and acts as general counsel for the Southern California Service Station Association and legislative consultant to the California Service Station Council. Mr. Carroll represented the plaintiff in the landmark case of Tameny v Atlantic Richfield Co., *on which the following article is based. His office may be contacted by writing to: 2301 West Lincoln Avenue, Suite 130, Anaheim, California 92801, or by calling (714) 776-4318.*

The wrongful termination of employment suit filed against Mobil Oil Corporation in Southern California by former sales representative Karl Hemsley (for details, see this issue, page 18) contains some important lessons for service station dealers. Hemsley should [illegible] about the [illegible] majors toward their dealers. In this article, we will focus on the legal significance of Hemsley's charges that Mobil systematically controls dealer retail prices by a policy of coercion and intimidation.

Governing law on price fixing: The basic federal antitrust law—The Sherman Act (15 U.S.C. §1) forbids price-fixing. It has been established for more than 20 years that an oil company may not use any form of economic coercion to control a service station dealer's retail price. *Simpson v Union Oil Co.* (1964) 377 U.S. 13. It is also well-settled that the fact that the supplier provides the product on a "consignment" basis still does not give that supplier the right to control the dealer's price. *Sun Oil Co. v Federal Trade Commission* (1965) 350 F. 2d 624. The U.S. Supreme Court has further declared that schemes to fix *maximum* prices (which is what Hemsley has accused Mobil of) violates the antitrust laws. *Albrecht v The Herald Co.* (1968) 390 U.S. 145.

Special federal court decree applicable to eight of the majors: A 1971 federal court decree in the case of *United States v The American Oil Co., et al.* (D.N.J. 1971 NO. 360-65) further strengthens the legal right of dealers of eight of the major oil companies to determine their own prices. Under Section VI of that decree, the following majors are permanently forbidden from using any coercion against dealers to affect retail pricing: The American Oil Co., Atlantic Richfield Co., Cities Service Oil Co., Cities Service Company, Gulf Oil Corporation, Humble Oil & Refining Company, Sinclair Refining Corporation and Mobil Oil Corporation. It should be noted that in the *Hemsley v Mobil* suit, the former sales representative has specifically alleged that Mobil attempted to force him to violate the terms of his decree.

Petroleum Marketing Practices Act: The federal PMPA, 15 U.S.C. §§2801-6, specifically forbids [illegible] or nonrenewal of a dealer's [illegible] unless the company has specific grounds for its action under the Act. The courts have further ruled, however, that even if a supplier has technical grounds for franchise cancellation, the dealer can oppose the company's action on the grounds that it has unfairly singled him out for retaliatory or discriminatory termination. *Gilderhus v Amoco* (1979) 470 F.Supp. 1302; *Crown Central Petroleum v Waldman* (1981) 515 F.Supp. 477; *DiNapoli v Exxon* (1982) 549 F.Supp. 449; *Thompson v Kerr*

(continued on page 17)

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legal corner

(continued from page 15)

McGee (1981) 660 F.2d 1380; *Pearman v Texaco* (1980) 480 F.Supp. 767; *Munno v Amoco* (1980) 488 F.Supp. 1114.

Evidence of coercion: The primary tool used by suppliers in attempt to control dealer prices is usually the threat of franchise termination or nonrenewal. As we have previously emphasized in these pages, it appears that in most cases it is the *threat* of such action that is used to affect the dealer's pricing decisions. If a franchisor wants to make good on such a threat, it will have to come up with a technical pretext for franchise cancellation under the Petroleum Marketing Practices Act. As discussed above, the dealer has the right to challenge such action by introducing evidence that the company is really motivated by an intent to retaliate against him for exercising his right to set his own prices. However, any such evidence must be as specific as possible. Most dealers who get into a serious dispute with a supplier do feel that they have been singled out for discriminatory action. However, it is not enough for the dealer to try to prove that he has a personality conflict with company personnel. Rather, he must be able to show that the franchisor is primarily motivated by its intent to control his retail prices through the use of coercion.

Evidence of price fixing can take many forms, including but not limited to: (1) The dealer's testimony that he was threatened with economic retaliation if he did not lower his price. Such testimony should include the name of the company employe involved, the date and place of the conversation, and an indication of what was said; (2) The dealer's diary or notes of such conversation made right after such conversations; (3) Copies of handwritten, typed or printed "suggested" prices from company personnel; (4) The testimony of other dealers that the company has similarly threatened them; and (5) Testimony and documents from former employes of the supplier showing that the company has a policy of controlling dealer prices.

Recommended procedures: Any dealer who encounters serious problems with supplier-attempts to control his retail prices may therefore want to consider the following suggested steps:

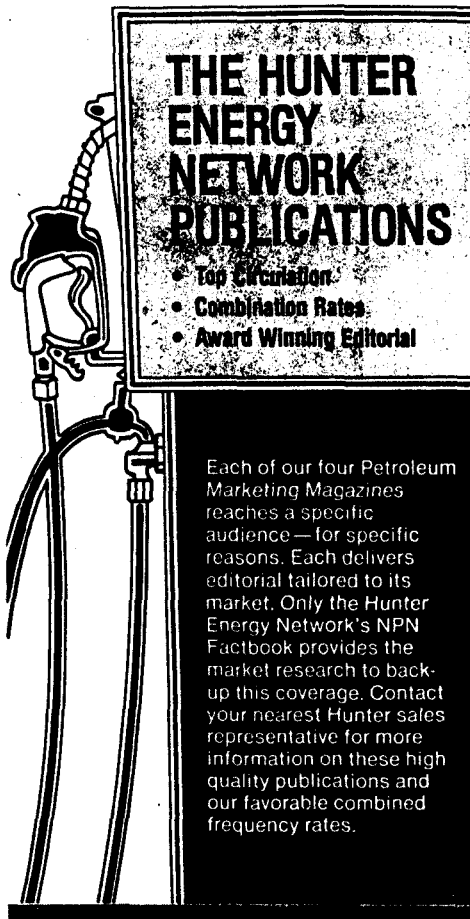
1. **Diary express of implied threats:** Dealers should make a careful written record of any supplier's efforts to force them to cut retail prices. The diary should include the names and positions of the oil company personnel involved, the date, time and place of the conversations, what was said, the names, addresses and phone numbers of any witnesses, and any details about the specific price cuts the supplier wanted. The dealer should also make notes of any significant circumstances which might tend to show that a "suggestion" was really an implied threat. For example, in some cases, the very frequency of visits to the station by a sales rep to "suggest" prices can imply that more than a "suggestion" was being made. Such records can be very useful in any actual or potential dispute situation.

2. **Federal court decree:** If you are a dealer of one of the eight majors subject to the federal court decree discussed above, make sure that your attorney obtains a copy of the decree from the New Jersey federal court.

3. **Save documents:** Be sure to save any documents or writings that tend to support your claim that the company attempted to control your prices or took retaliatory action against you. Such documents could include written "suggested" prices, improper or inaccurate default notices and the like.

4. **Present and former sales reps:** Most of the majors are still in the process of cutting back marketing departments. The documents filed with the court in *Hemsley v Mobil* indicate that there is a possibility that in some cases, former sales reps may have evidence in their possession which might tend to support the dealer's case. Therefore, it would be a good idea to the extent possible to keep track of any marketing employes who leave the company. Furthermore, you should be sure that your rep has a copy of this column which appeared in the September, 1984 issue of *SSM*. The column discusses the rights of company employes to refuse to break the law.

5. **Jobbers:** Jobber supplied dealers should be aware that their suppliers are under the same legal obligations mentioned above, therefore everything in this column applies equally to them. Δ



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BOOTH GARDNER
GOVERNOR

RECEIVED APR 11 1986

April 4, 1986

To the Honorable, the Senate
of the State of Washington

Ladies and Gentlemen:

I am returning herewith, without my approval as to sections 1(4), 1(7) in part, 2 and 16, Engrossed Senate Bill 4620, entitled:

"AN ACT Relating to retail trading practices in the sale of motor vehicle fuels."

This legislation creates a separate franchise law that regulates the business relationship between motor fuel refiner-suppliers and motor fuel retailers.

The Legislature has devoted substantial time and effort to examining allegations that the major oil companies are employing predatory pricing and other unfair practices against the independent lessee-dealers to whom they supply gasoline and other products. These allegations are occurring during a period when the nature of retail gasoline marketing is undergoing significant changes. Preserving a market niche for independent lessee-dealers in this changing environment has been a major concern of the Legislature. Accordingly, Senate Resolution 1985-92 created a Select Committee to investigate these allegations and to submit its findings and recommendations to the Legislature. This legislation is largely a product of the Select Committee's work.

The Select Committee's findings are reflected in the major components of Engrossed Senate Bill No. 4620: (1) recognition and protection of lessee-dealers' franchise rights, (2) prohibitions against certain unfair trade practices and provision of legal remedies to address violations, (3) authorization for a study by the Attorney General to determine whether motor fuel refiner-suppliers are employing unfair price discrimination between their owner-operated retail outlets and their lessee-dealers in the wholesale price charged for fuel, and (4) prohibitions against motor fuel refiner-suppliers unfairly discriminating in the wholesale price of fuel charged to their motor-fuel retailers in the same five-mile marketing area.

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I have carefully considered all of these elements, and I support essentially all but those provisions relating to refiner-supplier price discrimination against lessee-dealers in the same marketing area, as contained in section 2 of the legislation. While I can appreciate this as a thoughtful attempt to establish a way to address alleged unfair pricing practices, I am not convinced that section 2 is a workable means for ensuring a competitive gasoline market that protects the lessee-dealers or benefits the consumers.

Therefore, I am vetoing section 2, as well as section 1(4) which defines the "marketing area" applicable to section 2, and a portion of section 1(7) that exempts certain "motor fuel refiner-suppliers" from the jurisdiction of this legislation.

In addition, since no administrative remedies are provided in this legislation, I am also vetoing section 16 which is an unneeded reference to the Administrative Procedure Act.

I will be awaiting the results of the Attorney General's investigation of alleged unfair wholesale price discrimination employed by refiner-suppliers between their owner-operated stations and their independent lessee-dealers. This effort is to be completed by December 1, 1986. The civil investigative demand powers of the Attorney General should be effective in evaluating these alleged practices, which were the genesis of the Legislature's concern but which they were unable to document. Until these results are available, the legislation as approved should provide substantial protection for the investments and franchise rights of lessee-dealers.

With the exception of sections 1(4), 1(7) in part, 2 and 16, Engrossed Senate Bill 4620 is approved.

Respectfully submitted,

Booth Gardner
Governor

SB 4620

State of Washington

DEALERS BILL OF RIGHTS

(Brought to you by *The A.U.T.O. Bulletin*)

ESB 4620 – H FLR AMD 0659
By Representatives Braddock and B. Williams

(ED. NOTE: Sections or portions of the bill later vetoed by the governor are indicated.)

NEW SECTION. SEC. 1. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Advertisement" means any written or printed communication or any communication by means of recorded telephone messages or spoken on radio, television, or similar communication media published in connection with an offer or sale of a franchise.

(2) "Affiliate means any person, firm, or corporation who controls or is controlled by any motor fuel refiner-supplier, and includes any subsidiary or affiliated corporation in which the motor fuel refiner-supplier, and includes any subsidiary or affiliated corporation in which the motor fuel refiner-supplier or its shareholders, officers, agents, or employees hold or control more than twenty-five percent of the voting shares.

(3) "Community interest" means a continuing financial interest between the motor-fuel refiner-supplier and motor fuel retailer in the operation of the franchise business.

(4) Vetoed by Gov.

(5) "Motor fuel" means gasoline or diesel fuel of a type distributed for use in self-propelled motor vehicles and includes gasohol.

(6) "Motor fuel franchise" means any oral or written contract, either expressed or implied, between a motor fuel refiner-supplier and motor fuel retailer under which the motor fuel retailer is supplied motor fuel for resale to the public under a trademark owned or controlled by the motor fuel refiner-supplier or for sale on commission or for a fee to the public, or any agreements between a motor fuel refiner-supplier and motor fuel retailer under which the retailer is permitted to occupy premises owned, leased, or controlled by the refiner-supplier for the purpose of engaging in the retail sale of motor fuel under a trademark owned or controlled by the motor fuel refiner-supplier supplied by the motor fuel refiner-supplier.

(7) "Motor fuel refiner-supplier" means any person, firm, or corporation, including any affiliate of the person, firm, or coporation, engaged in the refining of crude oil into petroleum who supplies motor fuel for sale, consignment, or distribution through retail outlets

Vetoed by Gov.

(8) "Motor fuel retailer" means a person, firm, or corporation that resells motor fuel entirely at one or more retail motor fuel outlets pursuant to a motor fuel franchise catered into with a refiner-supplier.

(9) "Offer or offer to sell" includes every attempt or offer to dispose or solicitation of an offer to buy a franchise or an interest in a anchise.

(10) "Person" means a natural person, corporation, partnership, trust, or other entity and in the case of an entity, it shall include any other entity which has a majority interest in such an entity or effectively controls such other entity as well as the individual officers, directors, and other persons in act of control of the activities of each such entity.

(11) "Price" means the net purchase price, after adjustment for commission, brokerage, rebate, discount, services or facilities furnished, or other such adjustment.

(12) "Publish" means publicity to issue or circulate by newspaper, mail, radio, or television or otherwise to disseminate to the public.

(13) "Retail motor fuel outlet" means any location where motor fuel is distributed for purposes other than resale.

(14) "Sale or sell" includes every contract of sale, contract to sell, or disposition of a franchise.

(15) "Trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

NEW SECTION. SEC. 2.

Vetoed by Governor

NEW SECTION. Sec. 3. Notwithstanding the terms of any motor fuel franchise, a motor fuel refiner-supplier shall not absolutely prohibit or unreasonably withhold its consent to any sale, assignment, or other transfer of the motor fuel franchise by a motor fuel retailer to a third party without fairly compensating the motor fuel retailer for the fair market value, at the time of expiration of the franchise, of the motor fuel retailer's inventory, supplies, equipment, and furnishings purchased from the motor fuel refiner-supplier, and good will, exclusive of personalized materials which have no value to the motor fuel refiner-supplier, and inventory, supplies, equipment, and furnishings not reasonably required in the conduct of the franchise business. A motor fuel refiner-supplier may offset against amounts owed to a motor fuel retailer under this section any amounts owed by the motor fuel retailer to the motor fuel refiner-supplier.

NEW SECTION. Sec. 4. Notwithstanding the terms of any motor fuel franchise, no motor fuel refiner-supplier may prohibit or prevent the sale, assignment, or other transfer of the motor fuel franchise to a corporation in which the motor fuel retailer has an maintains a controlling interest if the motor fuel retailer offers in writing personally to guarantee the performance of the obligations under the motor fuel franchise.

NEW SECTION. Sec. 5. Notwithstanding the terms of any motor fuel franchise, the interest of a motor fuel retailer under such an agreement shall be considered personal property and shall devolve on the death of the motor fuel retailer to a designated successor in interest of the retailer, limited to the retailer's spouse, adult child, or adult stepchild or, if no successor in interest is designated, to the retailer's spouse, if any. The designation shall be made, witnessed in writing by at least two persons, and delivered to the motor fuel refiner-supplier during the term of the franchise. The designation may be revised at any time by the motor fuel retailer and shall be substantially in the following form:

"I (motor fuel retailer name) at the ..... service station located ..... in the City of ..... Washington, designate ..... as my successor in interest under section 4 of this act and ..... as my alternate successor if the originally designated successor is unable or unwilling so to act.

I so specify this ..... day of ..... 19 ..."

The motor fuel refiner-supplier shall assist the designated successor in interest temporarily in the day-to-day operation to insure continued operation of the service station.

NEW SECTION. Sec. 6. Notwithstanding the terms of any motor fuel franchise, the motor fuel retailer shall be given the right of first refusal to purchase the real estate and/or improvements owned by the refiner-supplier at the franchise location, and at least thirty days' advance notice within which to exercise this right, prior to any sale thereof to any other buyer.

NEW SECTION. Sec. 7. Notwithstanding the terms of any motor fuel franchise, no motor fuel refiner-supplier may:

(1) Require any motor fuel retailer to meet mandatory minimum sales volume requirements for fuel or other products unless the refiner-supplier proves that its price to the motor fuel retailer has been sufficiently low to enable the motor fuel retailer reasonably to meet the mandatory minimum;

(2) Alter, or require the motor fuel retailer to consent to the alteration of, any provision of the motor fuel franchise during its effective term without mutual consent of the motor fuel retailer;

(3) Interfere with any motor fuel retailer's right to assistance of counsel on any matter or to join or be active in any trade association; and

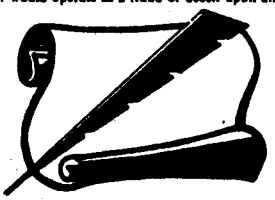
(4) Set or compel, directly or indirectly, the retail price at which the motor fuel retailer sells motor fuel or other products to the public.

NEW SECTION. Sec. 8. It is unlawful for any person in connection with the offer, sale, or purchase of any motor fuel franchise directly or indirectly:

(1) To sell or offer to sell a motor fuel franchise in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made not misleading.

(2) To employ any device, scheme, or artifice to defraud.

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.



Approved March 7, 1986

NEW SECTION. Sec. 9. Without limiting the other provisions of this chapter, the following specific rights and prohibitions shall govern the relation between the motor fuel refiner-supplier and the motor fuel retailers:

(1) The parties shall deal with each other in good faith.

(2) For the purposes of this chapter and without limiting its general application, it shall be an unfair or deceptive act or practice or an unfair method of competition and therefore unlawful and a violation of this chapter for any person to:

(a) Require a motor fuel retailer to purchase or lease goods or services of the motor fuel refiner-supplier or from approved sources of supply unless and to the extent that the motor fuel refiner-supplier satisfies the burden of proving that such restrictive purchasing agreements are reasonably necessary for a lawful purpose justified on business grounds, and do not substantially affect competition: **PROVIDED:** That this provision shall not apply to the initial inventory of the motor fuel franchise. In determining whether a requirement to purchase or lease goods or services constitutes an unfair or deceptive act or practice or an unfair method of competition the courts shall be guided by the decisions of the courts of the United States interpreting and applying the anti-trust laws of the United States.

(b) Discriminate between motor fuel retailers in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing, unless and to the extent that the motor fuel refiner-supplier satisfies the burden of proving that any classification of or discrimination between motor fuel retailers is reasonable, is based on motor fuel franchises granted at materially different times and such discrimination is reasonably related to such difference in time or on other proper and justifiable distinctions considering the purposes of this chapter, and is not arbitrary.

(c) Sell, rent, or offer to sell to a motor fuel retailer any product or service for more than a fair and reasonable price.

(d) Require motor fuel retailer to assent to a release, assignment, novation, or waiver which would relieve any person from liability imposed by this chapter.

NEW SECTION. Sec. 10. (1) Any person who sells or offers to sell a motor fuel franchise in violation of this chapter shall be liable to the motor fuel reseller or motor fuel refiner-supplier who may sue at law or in equity for damages caused thereby for rescission or other relief as the court may deem appropriate. In the case of a violation of section 8 of this act rescission is not available to the plaintiff if the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know or if he had exercised reasonable care would not have known of the untruth or omission.

(2) The suit authorized under subsection (1) of this section may be brought to recover the actual damages sustained by the plaintiff: **PROVIDED,** That the prevailing party may in the discretion of the court recover the costs of said action including a reasonable attorneys' fee.

(3) Any person who becomes liable to make payments under this section may recover contributions as in cases of contracts from any persons who, if sued separately, would have been liable to make the same payment.

(4) A final judgment, order, or decree heretofore or hereafter rendered against a person in any civil, criminal, or administrative proceedings under the United State anti-trust laws, under the Federal Trade Commission Act, or this chapter shall be regarded as evidence against such persons in any action brought by any party against such person under subsection (1) of this section as to all matters which said judgment or decree would be an estoppel between the parties thereto.

NEW SECTION. Sec. 11. The pendency of any civil, criminal, or administrative proceedings against a person brought by the federal or Washington state governments or any of their agencies under the anti-trust laws or to franchising, or under this chapter shall toll the limitation of this action if the action is then instituted within one year after the final judgment or order in such proceedings: **PROVIDED,** That said limitation of actions shall in any case toll the law so long as there is actual concealment on the part of the person.

NEW SECTION. Sec. 12. Any motor fuel retailer who is injured in his or her business by the commission of any act prohibited by the commission of any act prohibited by this chapter, or any motor fuel retailer injured because of his or her refusal to accede to a proposal for an arrangement which, if consummated, would be in violation of this chapter may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including reasonable attorney's fees.

NEW SECTION. Section 13. (1) The attorney general may bring an action in the name of the state against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful. The prevailing party may in the discretion of the court recover the costs of such action including a reasonable attorneys' fee.

(2) Nothing in this chapter limits the power of the state to punish any person for any conduct which constitutes a crime by statute or at common law.

NEW SECTION. Sec. 14. In any proceeding under this chapter, the burden of proving an exception or an exemption from definition is upon the person claiming it. Any condition, stipulation or provision purporting to bind any person acquiring a motor fuel franchise at the time of entering into a motor fuel franchise or other agreement to waive compliance with any provision of this chapter or any rule or order hereunder is void.

NEW SECTION. Sec. 15. The provisions of this chapter apply to any motor fuel franchise or contract entered into or renewed on or after the effective date of this act between a motor fuel refiner-supplier and a motor fuel retailer.

NEW SECTION. Sec. 16. Vetoed by Gov.

NEW SECTION. Sec. 17. It is the intent of the legislature that this chapter be interpreted consistent with chapter 19.100 RCW.

NEW SECTION. Sec. 18. This chapter shall be liberally construed to effectuate its beneficial purposes.

NEW SECTION. Sec. 19. This chapter shall be known as the "Gasoline Dealer Bill of Rights Act."

NEW SECTION. Sec. 20. The Washington state attorney general shall conduct a study to determine whether motor fuel refiner-suppliers are injuring competition from motor fuel retailers, by charging retailers that sell products under their trademark, prices for motor fuel which equal or exceed the prices charged for motor fuel in the same geographic market to retail customers at retail motor fuel outlets operated by company personnel, a subsidiary company, or commissioned or contract agents. The attorney general shall report his findings and recommendations to the legislature by December 1, 1986. Periodic reports shall be submitted to the legislative transportation committee. For the purposes of this study, the attorney general is authorized to use all of the civil investigative demand powers enumerated in RCW 19.86.110, subject to the procedures and requirements specified in RCW 19.66.110: PROVIDED, That disclosure of documentary material, answers to written interrogatories, or transcripts of oral testimony produced pursuant to a demand, or the contents thereof, to members of the legislature and legislative staff shall not require a court order unless the documentary material, answers to written interrogatories, or transcripts of oral testimony are identified at the time they are furnished as containing trade secrets. When seeking a court order allowing disclosure of material containing trade secrets, the attorney general shall give reasonable notice of such proceeding to the party furnishing the material.

NEW SECTION. Sec. 21. To carry out this act, the sum of forty-nine thousand dollars, or as much thereof as may be necessary, is appropriated to the office of attorney general from the motor vehicle fund for the biennium ending June 30, 1987.

NEW SECTION. Sec. 22. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 23. Sections 1 through 19 of this act shall constitute a new chapter in Title 19 RCW.

NEW SECTION. Sec. 24. (1) Sections 20 and 21 are necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions and shall take effect immediately.

(2) Sections 1 through 19, 22 and 23 of this act shall take effect June 30, 1986."

EXHIBIT 5
DATE 2/9/87
SB 541

BOARD OF NURSING
DEPARTMENT OF COMMERCE

1424 9TH AVENUE

STATE OF MONTANA

(406) 444-4279

HELENA, MONTANA 59620-0407

To: Representative Les Kitselman, Chairman
and Members of the Business And Labor Committee

Date: February 9, 1987

PROPOSED AMENDMENT TO HB 541:

Amend page 4, line 10 by:

inserting a period after the word "board", striking the word "and", inserting the words "Applicants must be" before the words "certified by the American Nurses", and capitalizing "N" in nurses' and "A" in association, so that the line reads "of the board. ~~and~~ APPLICANTS MUST BE certified by the American Nurses' Association"

EXHIBIT 6
DATE 2/9/87
HB 541

BOARD OF NURSING
DEPARTMENT OF COMMERCE

1424 9TH AVENUE

STATE OF MONTANA

(406) 444-4279

HELENA, MONTANA 59620-0407

To: Representative Les Kitselman, Chairman
and Members of the Business And Labor Committee

Date: February 9, 1987

Subject: Testimony on House Bill 541

I am Margaret Barkley, President of the Montana Board of Nursing and I am here on behalf of the Board to speak in support of H.B. 541.

The Board of Nursing exists to regulate the practice of nursing for the purpose of protecting the public. The Board has a long standing committment to insure that it continue to meet the responsibility for the public's health, safety and welfare. It is, therefore, necessary to amend the Nursing Statute from time to time to keep it current with changes in health care or other laws and to assure that the language be clear and easily interpreted.

HB 541 calls for staggering of terms for all Board Members. - Section 2-15-844, (4), MCA. The registered nurse and licensed practical nurse members, for the most part, historically have had and continue to have terms of office which have been overlapping within their respective groups. This staggering of terms meets the requirements of the current 2-15-1844, (4), MCA. Such a plan has resulted in continuity of members and therefore carry over of historical background of Board of Nursing activities. However, the situation is different for the two (2) public members. In 1981, the revised Nursing Practice Act called for

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two public members, in addition to the four registered nurse and three licensed practical nurse members. The Public Members were appointed the same year for the same terms of office. This has hindered continuity in the important consumer or public member group. The Board supports the proposed change for the staggered terms so that continuity and carry over of all groups of members will be provided. The alternating terms will be of benefit to the functioning of the public members, providing better transmission of background information on Board functions and follow through of matters coming before the Board.

Referring to section 37-8-202, MCA (5): Until recently, the Board has not found it "necessary" to define the rule further than those stated in Sub-Chapter 3 of the Board rules titled Specialty Areas of Nursing. However, at this time the Board believes the definition of equivalency must be addressed in terms of standards for evaluating the qualifications of applicants for specialty area recognition. Developing rules for consideration of equivalency would lead to clarity and to increased consistency in the determination of those nurses who might meet the criteria as currently found in the Rules in Sub-Chapter 3. The change in the Statute would strengthen the rules for implementation. The rules, developed as a result of the law change, would provide guidelines for applicants, clarify the current criteria and in the end lead to increased protection for the public. For these reasons, we support this change.

In section 37-8-441, MCA (5), the Board requests the change to provide strength to the rules which are developed by the Board. Nursing practice is constantly undergoing changes and with these changes, comes increased responsibility for the Board to protect the public. The Board must clearly have the charge to deal with future questions or problems some of which might be unprofessional conduct.

The amendment offered in Section 37-8-442 (1), MCA, would revise the Board's investigation and complaint and

hearing procedures. Such a change would also provide for consistency with the Administrative Procedures Act.

Amending this section would also clarify for constituents and the public the procedure which must be followed by the Board. The change would further clarify the rights and responsibilities of the public, the nurses, and the Board of Nursing. The end result would provide greater protection for all concerned.

Thank you for the opportunity to present these comments on behalf of the Board of Nursing. We urge your support of House Bill 541.

EXHIBIT 7
DATE 2/9/87
HB 541

BOARD OF NURSING
DEPARTMENT OF COMMERCE

1424 9TH AVENUE

STATE OF MONTANA

(406) 444-4279

HELENA, MONTANA 59620-0407

To: Representative Les Kitselman, Chairman
and Members of the Business and Labor Committee

Date: February 9, 1987

Subject: Testimony on House Bill 541

I am Janice Anderson, public member on the Montana Board of Nursing. I am here to speak in favor of House Bill 541, amending sections of the nursing law.

Section 2-15-1844, MCA. I orginally suggested that the Board request that change because both public members currently have the same terms of office. It takes time to become familiar with the issues facing the board, so it is not in the best interest of the public to have both public members new to the board at the same time.

Section 37-8-202, MCA. As the law now reads, the board is directed to accept education gained "in a university setting or its equivalent". Nowhere is the term equivalent defined and the board has been faced with a variety of education options to judge. To insure fair treatment of all applicants, the board needs to define the term "equivalent".

Section 37-8-442, MCA. Amending this section would clarify the law in relation to the handling of complaints under the Administrative Procedures Act and would facilitate the functioning of the Board.

For these reasons I urge you to support House Bill 541, MCA.

Thank you.

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"AN EQUAL-OPPORTUNITY EMPLOYER"

DATE 2/9/87
HB 541

WITNESS STATEMENT

NAME Barbara Boehler BILL NO. HB 541

ADDRESS 705 Colonial Helena, MT DATE 2/9/87

WHOM DO YOU REPRESENT? Montana Nurses Association

SUPPORT V OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

Chairman Keating, members of the committee I am Barbara Boehler Executive Director of the Montana Nurses Association representing over two registered nurses across the state.

In the interest of time, I will briefly state that we support HB 541 and concur with the previous testimony and the position of the Mt. Board of Nursing.

I will be happy to answer any questions from the committee.

Thank you.

Respectfully submitted.

Barbara E. Boehler

EXHIBIT 9
DATE 2/9/87
HB 593

TESTIMONY

TO: Business Committee, House of Representatives, State of Montana

FROM: J. Riley Johnson, State Director of Governmental Relations, NFIB/MONTANA

RE: Private Enterprise Act -- HB 593

February 9, 1987

Mr. Chairman, ladies and gentlemen of the committee, for the record my name is J. Riley Johnson and I am the State Director of Government Relations in Montana for the National Federation of Independent Business (NFIB). Our association represents nearly 5,000 small and independent businesses throughout Montana. I come before you today to urge your favorable consideration of HB 593.

Before I begin, I should note that the question of government competition with private enterprise was put to our membership in our 1985 NFIB statewide ballot and over 73 percent of the respondents stated that their business was affected by competition from the public sector. And, again in 1987, we put this question to our members in personal interviews and discovered that over 78% of the members interviewed were being affected by competition from the public sector. This is no small issue with the small and independent business community of your state.

NFIB bases its support for government compeitition legislation on two fundamental beliefs: 1) Contracting out is simply a good business practice, as has been proven time and again by university studies, by private studies, and by the Small Business Administration. It affords the most effective and efficient method of providing state government the needed goods and services. It also forces state government to plan and budget for the highest priority among its services and not merely do things...spend money on projects...because the people and equipment are already there and need to be used. 2) The government's legitimate sphere of operation is to govern...not to engage in commercial or industrial enterprise and compete with its citizens through in-house production of any goods and services which are readily availble at reasonable prices in the "for-profit" community.

In-house production of goods and services translates into lost income for small business; lost taxes on income, equipment and property, and lost opportunity for Montana to

develop its economic base. The state of Montana is the largest customer...the biggest market....for Montana's businesses. We are heading in a direction that this market is being taken away from the businesses and thus the businesses are declining in Montana...the jobs are declining...the tax base is declining.

Certainly, there are some functions that state government can and should be providing for its citizens. To a large degree, these have already been designated by legislation...designated by you, the legislators of our state. But, there are many other functions that are being delivered to our citizens that have not been designated by the elected representatives of our citizens. They are and have been designated by agency administrators who are building bureacracies and blotting budgets that are crippling our state's economy.

If history means anything, perhaps were should read the words of your peers from the 1977 Legislature in the forms of the two House Joint Resolutions I have passed out to you. The time is now, ladies and gentlement of the committee. We have run out of money in running our state government...and if we continue the competition with our private sector, we will run out of money in the private sector, too.

HB 593 does three (3) things:

1.) It prohibits state agencies from providing goods and services to other state agencies, unless specifically allowed by statute. It does not prohibit state agencies from providing for their own needs. If the Legislature decides that certain state functions should be done by state government, then it has the option to pass legislation allowing it. What are we doing here? We are taking the decision making on such budget-busting ideas of inter-agency delivery of goods and services out of the hands of the appointed administrators and putting that decision where it rightfully belongs...in the hands of our elected representatives who must also make the decisions on the money that pays for all these goods and services.

2.) We are stating that where statute does provide for competition with the private sector that when bids are given that the state agencies be required to include all costs, including labor, rent, overhead and related items...just like any other business would do to be competitive and deliver the service or goods at the best dollar. The hidden costs of state delivered services and goods are one of the reasons we are going broke here in Montana.

3.) We are asking that a Private Enterprise Review Commission be established to review the competition questions and recommend to the Legislature what functions

should be in the domain of state government and what should not. This Review Commission would also act as a "day in court" or a hearing panel for private enterprise that feels it can provide goods and services to our state government at a better price. Today, that opportunity is lost for our private enterprise community. This Review Commission would be handled by volunteers with a minimum cost of under $5000 for two years...a small price to pay for JOBS in the state of Montana. Just last week, NFIB surveyed 50 businesses throughout Montana which had indicated they had been affected by government competition and asked how many jobs would be created if they could effectively compete. 46 out of the 50 businesses stated they would create at least one job. That is about $100 per job created. Not bad business. Another example is a laundry in Havre reported it has lost over 18 jobs to competition from state government and would gladly re-hire those people, if the competition did not cripple their business.

HB 593 is not new. The state of Arizona has adopted this same law and has found it to be working so well it re-established its Review Commission in 1985 when it was to be sunsetted.

It is not our intention to merely cut out state jobs. On the contrary, we know HB 593 will create jobs...but in the private sector. Nor, is it our intention to raise costs of delivering goods and services of state government by the so-called "paying more outside". If the true costs of these goods and services were revealed, we know that cost savings would be real. And, the need for such goods and services would be real, too.

In summary, ladies and gentlemen, we ask your support of HB 593 and support of the dwindling private enterprise sector of small business in Montana. We ask that you put the decisions back into the hands of the Legislators...where it belongs...instead of in the hands of administrators who have proven they can not run a business within a budget. We ask that you give us the vehicle for small business to review the delivery of goods and services and to make recommendations to your body in the future...leaving the decisions up to you.

Evidence of the need for legislation addressing government competition with private enterprise is shown in the numerous bills before you this session that discuss this issue. HB 593 is an encompassing bill that will address all these issues and do it fairly and with the proper hearings and considerations by all concerned.

If you strike one blow for the survival of small business in our State, let it be HB 593.

EXHIBIT 10
DATE 2/9/87
HB 593

On March 19, 1977 House Joint Resolution number 55 was approved and is quoted below in it's entirety:

"A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA RECOGNIZING THE VALUE OF AMERICA'S SYSTEM OF FREE ENTERPRISE AND ENCOURAGING THE VIGOROUS SUPPORT OF BUSINESS BY THE PEOPLE, THE PUBLIC SCHOOL SYSTEM, AND THE GOVERNMENT OF THE GREAT STATE OF MONTANA.

WHEREAS, the American system of private enterprise has been the cornerstone of this nation's democratic form of government, has fortified individual personal freedoms, and has propelled the nation to a position of prosperity and equal opportunity; and

WHEREAS, the United States of America has experienced two centuries of progress achieving freedom, liberty, and equality and has achieved abundance for her people who enjoy a standard of living unequaled in the world; and

WHEREAS, small business and free enterprise are the corner stones of this progress and stand as a symbol of American character and spirit; and

WHEREAS, in this the beginning of our third centruy as a nmation, it is fitting that we reflect upon those virtues and ideals that have preserved us as a nation, that have brought us to our present state, wherein the individual and individual opportunity count most with our countrymen; and

"WHEREAS, if this nation is to preserve and maintain these freedoms and this heritage for the people, their children and future generations, we must assure hat government does not become an impediment to the survival of the private enterprise system that America has worked so long and hard to achieve.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That we, the people of the great State of Montana, must sustain and continually improve a climate in which business can flourish, in order that this nation and state continue to flourish;

BE IT FURTHER RESOLVED that it is the sense of the people of the State of Montana that private enterprise and small business entrepreneurship are essential to the preservation of individual liberty and freedom for all our citizens;

BE IT FURTHER RESOLVED that a healthy and prosperous business community is essential to the economic and social well-being of the state, now and in the future;

BE IT FURTHER RESOLVED that it shall be the declared policy of the people and the Legislature to preserve, protect, and foster the creation, development, and balanced growth of business in the state;

BE IT FURTHER RESOLVED that it shall be the policy of the Legislature that courses in economics and the private enterprise system shall be vigorously encouraged in Montana's public school system at all levels to insure the continued understanding, support, and improvement of this system for future generations;

BE IT FURTHER RESOLVED that it shall be the policy of the Legislature that all agencies, departments, and bureaus of the state government shall take all possible measures to foster and assist the business community, to help create favorable conditions for small businesses, and to take such other measures as may be appropriate to the interests of all business."

(2)

EXHIBIT 11
DATE 2/9/87
HB 593

Three days later, on March 22, 1977 this 45th legislature approved House Joint Resoulution number 58 which reads as follows:

"A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA DIRECTING STATE EXECUTIVE DEPARTMENTS TO DIVERT AS MUCH STATE WORK AS POSSIBLE TO THE PRIVATE SECTOR IN ORDER TO AVOID UNWARRANTED GROWTH OF STATE GOVERNMENT.

WHEREAS, the number of state government employees has increased more rapidly than the employment rate in the private sector; and

WHEREAS, in many cases the cost of a project conducted by the state is comparable to or exceeds the amount which the same project would have cost had it been conducted by the private sector; and

WHEREAS, interagency contracting with no consideration given to contracting with private firms perpetuates government growth to the detriment of the private sector; and

WHEREAS, the Legislature does not wish this unbalanced situation to continue.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

(1) that it is the policy of state government to promote the use of private resources wherever it is found that private enterprise can provide the same service and add to the taxable base of the state;

(2) that all state executive departments shall re-examine their departments and cooperate with the economic advisors to the governor to determine those services that should be vested with the private sector in particularly those areas where the state tends to compete with the private sector;

(3) that the Secretary of State shall send a copy of this resolution to the head of each state executive department;

(4) that each department head is directed to follow the intent of this resolution and to that end shall prepare a plan for the adoption of the policy contained herein and submit it to the Legislative Auditor for review by July 1, 1977;

(5) that this resolution is not intended to displace persons currently employed by state government, but to move toward greater use of private resources and to reduce the growth rate of government employment."

VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. House Bill No. 475 DATE February 9, 1987

SPONSOR Rep. Barry Stang

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
[illegible]	[illegible]	X	
[illegible]	[illegible]		
[illegible]	[illegible]		
[illegible]	[illegible]		
[illegible]	[illegible]		
[illegible]	[illegible]	X	
[illegible]	[illegible]		
Bonnie Alexander	Mont. Petroleum Marketers		X
Kurt Krueger	Mont Pet Marketers Ass		X
[illegible]	[illegible]		
[illegible]	[illegible]		
Lorna Frank	MTM	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. House Bill No. 473 DATE February 9, 1987

SPONSOR Rep. Raymond L. Brandewie

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
[illegible]	[illegible]	Yes	
[illegible]	[illegible]	Yes	
Walter F. Iverson	Self		X

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VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. House Bill No. 541 DATE February 9, 1987

SPONSOR Rep. Clyde B. Smith

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
JEFF BRAZIER	D.O.C.	L	
Jess Roccus	Montana Nurses Assoc	✓	
Margaret Barkley	Boards Company	✓	
Barbara E Booher	Montana Nurses Assoc	—	

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VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. House Bill No. 593 DATE February 9, 1987

SPONSOR Rep. Jan Brown

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
[illegible]			
Jaye Ashley	Dept Admin		X
Don Ingle	MT. Chamber of Commerce	X	
Riley Johnson	NFIB	X	
Ken Dunham	Assoc. Printers & Publishers	X	
Sue Weingartner	MT Solid Waste Contractors Assn	✓	
Dennis Johnston	" "	✓	

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