

11:10 a.m.
March 24, 1977

MINUTES OF THE MEETING

BUSINESS AND INDUSTRY COMMITTEE

MONTANA STATE SENATE

The meeting of the Business and Industry Committee was called to order by Chairman Frank Hazelbaker on the above date in Room 415 of the State Capitol Building.

ROLL CALL: All members were present with the exception of Senator Kolstad.

CONSIDERATION OF HOUSE BILL 304. "An Act For The Recodification And General Revision Of Chapters 1 And 4 Of Title 51, R.C.M. 1947, Relating To Unfair Trade Practices."

James Wood, Attorney for the Department of Business Regulation stated he did much of the work on House Bill 304. The Unfair Trade Practices Act was adopted in 1937 and assigned to the Department of Business Regulation. It deals with two anti-competitive activities engaged in by businesses. (1) Discriminatory Sales. Selling at one price in one place and selling for another price at another place. (2) Sales below cost. Cost defined by the act as acquisition cost plus the business cost.

He did research other state laws and they have been unsuccessful when they had language similar to ours. Wisconsin language is the primary change in HB 304. He stated the Legislative Council was preparing a recodification bill, HB 31. They took HB 31 and built HB 304 from it. HB 304 would be assigned to the Department of Business Regulation for enforcement. Since passage in the House there have been a number of concerns brought to them. Because of some of these problems he has prepared the following amendments. (Exhibit #1) He urged adoption of HB 304 with the amendments.

He stated there is little substantive difference except for section 9 of this bill and that is the section that deals with sales and cost. Also carried over on page 12 are provisions of sale below cost which becomes *prima facie* evidence and this intent is unlawful. Section 2, page 3, lines 1 and 14 are Wisconsin law which they thought they needed in Montana.

PROONENTS:

Dave Cogley, Legislative Council, stated he was assigned this particular portion of law. As a matter of trying to straighten out the conflict they did talk to the Department of Attorney General when they drafted the bill. This was agreeable with Attorney General Woodhall at that time.

Mr. Cogley stated other than Section 9 they don't feel there are any real substantive changes from existing law. For the sake of clarifying this he handed out an outline explaining the transfer of old sections into the new chapters. He stated they certainly support HB 304. (Outline attached - Exhibit #2)

Mike McGrath, Department of Justice, stated they support HB 304. The enforcement function that was once in the Attorney General's Office will be taken out and will be put in the Department of Business Regulation. He offered one amendment which is attached. (Exhibit #3) He stated they want to enforce state statutes and without this amendment they won't be able to do that.

Ross Cannon representing Montana Food Distributors Association. He stated he represents single grocery stores such as Midi Mart, etc. They have an interest in this kind of legislation. They are particularly supportive of section 9 so that a small grocer may protect himself. They agree with the legislation in its new tightened up form. They do support this bill.

OPPONENTS:

Russ Livergood, lobbyist for the Montana Retail Association. His testimony is attached. (Exhibit #4)

Mr. Wood responded to some of the things that Mr. Livergood testified to.

He stated the assertion that the existing laws are working well is not true. That is why they have HB 304. Section 2 is definitions. This is new because it is borrowed from Wisconsin. He stated you could not draft a law so specific that it would apply to every situation. Mr. Livergood's concern of subsection 5 on page 2 is taken care of with the proposed amendment. It wasn't his intent in HB 304 to make extensive changes in existing law.

Senator Devine asked Tom Haines, Montana Food Distributors, how do you feel about this bill? Mr. Haines stated they support the bill.

He also asked the gentleman from Montana Hardware and Implement how he feels about the bill. He stated they support the bill also.

Chairman Hazelbaker asked Mr. Cogley there was no substantive change other than section 9, is that correct?

Mr. Cogley stated the transfer of functions from Attorney General's Office should also be recognized as a substantive change and this is penciled in in his outline.

Senator Lowe stated he would like to see in the old law the business about having to sell at the same price everywhere in the state. He stated if you sell auto parts, they have a system that they sell to the general public at an OAM price and if you can establish that you are a wholesaler then that is a different price entirely.

Mr. Wood stated that section 51-101 of existing law and section 51-407 deal with the same pricing matter.

Senator Regan asked Dick Disney what he thought of the proposed amendment by Mike McGrath.

Dick Disney, Consumer Affairs Division, stated they see no problem with it.

Senator Goodover stated how would this apply to an auto dealer that gives away turkeys at Thanksgiving time or gives rebates? Everyone of those would have to be investigated.

Mr. Wood stated only if they got a complaint would it have to be investigated.

Mr. McGrath stated if a manufacturer gives a rebate it is doubtful that they would bring this below the 6%.

Senator Regan stated she felt comfortable with the bill except for page 9, subsection 2.

Mr. Wood stated this is existing law in Montana now.

Senator Goodover stated what about a bartender in Butte who sells some of this "stuff." There are still bartenders who will buy every second or third drink. They are trying to take the business away from someone else.

Mr. Disney stated that you will find that practice has been in every bar in the city of Butte. That does not now prevail.

Senator Lowe asked how many cases have they had with unfair business practices in recent times.

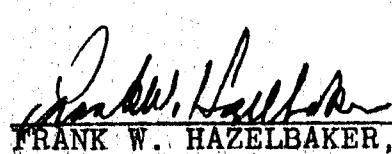
Mr. McGrath stated he did not know.

Mr. Disney stated the Department of Regulations has had 51 complaints since 1953. There were alleged violations in 23. None were convicted. That is why they are here with HB 304.

Senator Goodover stated in the 23 violations that you found, what were the extent of these violations?

Mr. Disney stated one example was some flyers had been published. Out of the 50 items in the flyer, there were 27 below cost.

ADJOURN: There being no further business, Chairman Hazelbaker adjourned the meeting at 12:25 p.m.



FRANK W. HAZELBAKER, CHAIRMAN

SENATE

COMMITTEE

BILL HB 304

VISITORS' REGISTER

DATE 3-24-77

ROLL CALL

Business & Industry COMMITTEE

45th LEGISLATIVE SESSION - - 1977

Date 3-24-77

DEPARTMENT OF BUSINESS REGULATION PROPOSED AMENDMENTS TO HOUSE BILL NO. 304

1. Amend page 1, section 1, line 22 through line 24.

Following: "prevented."

Strike: the last sentence of section 1 in its entirety

2. Amend page 3, section 2, line 17 on page 3 through line 2 on page 4.

Following: "costs,"

Strike: the balance of line 17 on page 3 through line 2 on page 4

Renumber: all subsequent sub-sections

3. Amend page 25.

Following: line 25

Insert: "Section 21. There is a new R.C.M. Section numbered 51-520 that reads as follows:

"51-520. If any part of this chapter is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this chapter is invalid in one or more applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Renumber: all subsequent sections

HOUSE MEMBERS

ROBERT L. MARKS

CHAIRMAN

FRANCIS BARDANOUVE

OSCAR KVAALEN

PAT MCKITTRICK

ROSE WFBER
EXECUTIVE DIRECTORPAMELA DUENSING
ADMINISTRATIVE ASSISTANTROBERTA MOODY
SUPERVISOR, ALTER SYSTEM

SENATE MEMBERS

NEIL J. LYNCH

VICE CHAIRMAN

GLEN DRAKE

CARROLL GRAHAM

FRANK HAZELBAKER

DIANA DOWLING

DIRECTOR, LEGAL SERVICES;
CODE COMMISSIONER

ROBERT PERSON

DIRECTOR, RESEARCH

Montana Legislative Council

State Capitol

Helena, 59601

Because of the duplication and conflict in chapters 1 and 4 of Title 51, R.C.M. 1947, concerning unfair trade practices it is necessary to rewrite both chapters into one consistent, coherent chapter. The new chapter would be chapter 5, Title 51, R.C.M. 1947. The consolidation cannot be accomplished by mere recodification because of substantive conflict in existing provisions, which is beyond the authority of the code commissioner to resolve. For example, 51-113 places enforcement responsibility in the department of business regulation, while 51-408 places it in the attorney general's office.

The provisions of chapter 4 were transferred from the old Title 94 upon adoption of the 1973 criminal code. Most of them date back to 1909 or 1913, and are much older than the provisions of chapter 1, several of which were amended in 1975. Hence generally where there is duplication or conflict, this bill adopts the chapter 1 provision.

The overall approach in consolidating these two chapters is to transfer all the offenses enumerated in both chapters to one new part and establish a standard penalty clause for all offenses with the exception of forming an unlawful trust (as set out in 51-401). All penalties would be set out in one penalty section.

The other substantive change is to transfer all enforcement functions to the department of business regulation. This would relieve the attorney general from the duties spelled out in 51-408 and 51-404. The responsibility for prosecuting third-time offenders (for any of the offenses listed in the new part) will also go to the department under ~~51-523.51-520~~.

An outline is attached at the end of this explanation to further illustrate the transfer of old sections into the new chapter.

1 (17) Section 1. 51-117, the purpose clause of chapter 1, is adopted as the purpose for the new chapter.

2 (2) Section 2. A new definition section is created, collecting definitions found in 51-101.1, 51-103, 51-107, and 51-401, plus new material added by the department.

3 (23) Section 3. The first paragraph of 51-102 is codified here, stating who is legally responsible for violations.

4 (10) Section 4. The last paragraph of 51-102 and the first sentence of 51-105 are combined here in a new section on proof of intent.

5 (17) Section 5. This is a revised version of the old 51-401. Painstaking effort was taken to determine and preserve the original meaning; however, it is probably arguable whether this was accomplished. As a note of interest, the department's bill adopted this version also.

6 (22) Section 6. 51-402 is placed here, without any substantive revision.

7 (4) Section 7. This new section is a consolidation of 51-407 and 51-101. Those two sections were strikingly similar, hence the composite was relatively simple. Subsection (2) is new in department bill.

8 (7) Section 8. This is a revised version of 51-403. There is no substantive change.

9 (6) Section 9. The first paragraph, less the penalty, of 51-103 is placed here, concerning sales at less than cost, substantially rewritten by the department, but retains same general thrust.

10 (7) Section 10. This section concerning cost surveys is the second sentence of 51-105. There is no change. This is not in department's bill. Is generally contained in (3) and (4) of definition section.

11 (6) Section 11. 51-114 is codified here without substantive change.

12 (6) Section 12. 51-104 is codified here without substantive change.

Sec. 9 of
HB 304
replaces
sections
11, 12, 13
of HB 304

making substantive
changes to existing law.

Section 43. 51-107 is codified here without substantive change.

13 (9) Section 44. 51-106 is codified here without substantive change.

14 (14) Section 45. 51-108 is codified here without substantive change.

15 (12) Section 46. 51-411 is codified here without substantive change.

16 (13) Section 47. 51-413 is codified here without substantive change.

17 (24) Section 48. 51-116 is codified here without substantive change.

17 (12) Section 49. 51-113 is codified here without substantive change, except for the fine structure on page 20, lines 11 through 13.

16 (20) Section 50. 51-115 is codified here without substantive change.

22 (20) Section 51. 51-111 is codified here without substantive change, except it grants attorney fees.

23 (25) Section 52. 51-110 is codified here without substantive change.

23 (25) Section 53. 51-109 is codified here. It is revised to include all offenses in both chapters rather than merely those offenses listed in chapter 1, and changes the prosecution function from the attorney general to the department of business regulation.

25 (5) Section 54. 51-524 incorporates the penalty provisions of 51-103, 51-112, 51-401, 51-405, 51-409, 51-412, and 51-414, i.e., all the penalty provisions of both chapters. The potential fine for violations of old 51-411 and 51-413 are raised by this proposed section and the minimum fine is deleted. The potential fines of 51-405 and 51-409 are also changed. If the old restrictions are desired, they can be added as sub-sections to this section.

25 (16) Section 55. The reference in 8-103.4(8) to 51-401 is changed to chapter 5, Title 51.

22 (7) Section 56. The reference in 82A-401.1(8) to chapter 1, Title 51, is changed to chapter 5.

30 (11) Section 57. The reference in 82A-404 to Title 51, chapter 1, is changed to chapter 5. The reference to "Unfair Practices Act" is deleted.

(21) ²⁴ Section 26. After the adoption of this bill there will no longer be an "Unfair Practices Act" denominated as such. Hence the reference to "Unfair Practices Act" in 84-2412 is changed to "Chapter 5, Title 51".

(10) ²⁵ Section 29. Section 51-101 is repealed and replaced by 51-507.

Section 51-101.1 is repealed and replaced in 51-502.

Section 51-103 is repealed and replaced by provisions in 51-502, 51-509, and 51-~~524~~. 519.

Section 51-105 is repealed and replaced in provisions in 51-504 and 51-~~516~~. 509

Section 51-112 is repealed and replaced in provisions in 51-524.

Section 51-116 is repealed and replaced in provisions in 51-518.

Section 51-401 is repealed and replaced in provisions in 51-505, 51-502, and 51-~~524~~. 519

Section 51-403 is repealed and replaced in provisions in 51-508.

Section 51-404 is repealed and the prosecution function transferred to the department of business regulation.

Section 51-405 is repealed and replaced in 51-~~524~~. 519

Section 51-406 is repealed and is not replaced.

Section 51-407 is repealed and is replaced by 51-507.

Section 51-408 is repealed and the prosecution function is transferred to the department of business regulation.

Section 51-409 is repealed and replaced in provisions in 51-~~524~~. 519

Section 51-410 is repealed and is not replaced.

Section 51-412 is repealed and replaced in provisions in 51-~~524~~. 519

Section 51-414 is repealed and replaced in provisions in 51-~~524~~. 519

Sections 51-104, 51-107, and 51-114 are repealed and replaced (with substantive revision) in 51-509.

<u>New</u>	<u>Old</u>	<u>Catch line</u>
51-501	51-117	Purpose
51-502	51-103, 51-101.1, 51-401, 51-107	Definitions
51-503	51-102	Persons responsible
51-504	51-102, 51-105	Proof of intent
51-505	51-401	Unlawful restraint of trade
51-506	51-402	Labor excepted
51-507	51-407, 51-101	Discrimination in sales
51-508	51-403	Unfair competition in purchasing
51-509	51-103 ✓	Sale at less than cost forbidden
51-510	51-105 ✓	Cost surveys
51-511	51-114 ✓	Establishing cost survey
51-512	51-104 ✓	Forced sale not basis of cost price
51-513	51-107 ✓	Sales excepted
51-514 510	51-106	Fair price for agricultural products
51-515 511	51-108	Rebates forbidden
51-516 512	51-411	Pooling of grain prohibited
51-517 513	51-413	Destruction of food in restraint of trade
51-518 514	51-116	Alteration of invoices prohibited
51-519 515	51-113	Enforcement by department
51-520 516	51-115	Investigations

<u>New</u>	<u>Old</u>	<u>Catch line</u>
51-524 517	51-111	Injunctions - damages
51-522 518	51-110	Recovery on illegal contracts forbidden
51-523 520	51-109	Department to institute suit
51-524 519	51-103, 51-112, 51-401, 51-405, 51-409, 51-412, 51-414	Penalty

Mike M'Grath

Exhibit #3

The following is a suggested amendment to House Bill
No. 304:

That House Bill 304 be amended as follows:

1. Amend Page 22, Section 17, line 25.

Following: "if injured thereby,"

Insert: "or the attorney general,"



ONTANA RETAIL ASSOCIATION

GRANITE BLOCK • P. O. BOX 440 • HELENA, MONTANA 59601
SERVING THE TOTAL INTERESTS OF MONTANA RETAILERS

AREA CODE 406
442-3388

HOUSE BILL NO. 304

AN ACT FOR THE RECODIFICATION AND GENERAL REVISION
OF CHAPTERS 1 AND 4 OF TITLE 51, R.C.M. 1947,
RELATING TO UNFAIR TRADE PRACTICES.

Testimony before the Senate Business & Industry Committee

Mr. Chairman, Members of this Committee:

My name is Russ Livergood, lobbyist for the Montana Retail Association, appearing before you in opposition to House Bill No. 304.

Montana currently operates under two unfair practices statutes. They are Chapters 1 and 4 of Title 51, R.C.M. 1947, and Chapter 275 of the Session Laws of 1973. Both of these statutes have worked extremely well for the benefit of consumer and businessman alike, and much of the revision in H.B. 304 will serve to punish both consumer and businessman if adopted in its present form. We believe the status quo should be preserved.

House Bill 304, in recodification and revision, shows seven new sections, containing 53 subsections of rules and regulations which must be adopted and followed by an already overburdened and certainly overregulated business community. The new sections are sections 2, 4, 5, 7, 8, 9 and 20, and constitute almost one-third of the total bill.

Subsection (3) of Section 2 on page 2 becomes extremely vague and uncertain in meaning, on line 23 beginning with the words "to which shall" and continuing on lines 24 and 25 with the words "be added a markup to cover a porportionate part of the cost of doing business." It is difficult to determine a porportionate part of the cost of doing business when the cost of doing business to one firm in one locality of the state may be vastly different from the cost of doing business to a like firm in another part of the state. Frankly, we don't know what is meant by the statement "to cover a porportionate part of the cost of doing business" and submit to you that it is unclear, extremely vague and probably has no meaningful application.

Subsection (5) of Section 2 on page 3, continuing through line 25 and through lines 1 and 2 on page 4, provides that: "Prices at which purchases of merchandise are made by retailers or wholesalers cannot be justified by prevailing market conditions in this state when they are below the lowest prices at which the manufacturer or producer of such merchandise sells to other retailers or wholesalers in this state." This particular language seems to ignore the fact

that many Montana businesses and cooperative purchasing groups do not purchase goods in the state of Montana. Hence the reference to what a retailer would have to pay in the state of Montana is irrelevant. Many more businesses simply do not purchase large numbers of goods in Montana. Hence the comparison to what other retailers would have to purchase the goods for in Montana is an unfair measure of the cost. Further, there are possible constitutional infirmities in this section in that it may be violative of the Interstate Commerce clause provision of the United States Constitution. This section of H.B. 304 would seem only to raise prices to the consumer by eliminating the businessman's incentive of buying at the most competitive prices.

On page 7, lines 12 through 16 of Section 4, includes language which creates a strict liability statute in that there is only a need to allege and prove the intent of the person, firm or corporation for whom an individual works in order to prove the intent of another individual. This is the reverse of the general method in which the intent is imputed from an individual to the corporation. It seems doubtful in a criminal prosecution, as this may well turn into, whether it is proper to impute the intent of the corporation or the master to the agent of that corporation. Historically, this type of vicarious liability in criminal matters has been rejected by all of the courts and it seems that this is a case where it also should be rejected.

The requirements in Section 7, subsection (1) on page 9, lines 6 through 14, stating it is unfair competition to sell articles of commerce at different prices in different localities within Montana is wholly unfeasible unless you wish to punish the consumer. And the consumer would be punished under this section since, for instance, the J. C. Penney Company, operating 22 stores in 22 different localities in Montana, could conceivably have a wide range of price differential for the same item of the same quality in different localities within the state. The governing factor would be the mobility of the merchandise. For instance, what might be a fast mover in Billings, Great Falls, Helena and Missoula could be a very slow mover in Plentywood, Glasgow, Cut Bank and Hamilton. Store management has the latitude of taking a lesser markup which results in a lower price for this slow moving item, but would not have that choice under the terms of Section 7, subsection (1). Additionally, there are other governing factors which might allow the same firm to sell at a lesser price in one locality than another. Such as rent, labor cost, taxes, utilities and a myriad of other factors. Thus, consumers who might buy the article considerably cheaper in a firm's store in one locality than in another will be unable to do so.

On page 9, subsection(2) of Section 7, beginning on line 15 and continuing through line 20, is one of the most punishing sections of the entire bill in that it clearly shifts the burden of proof to the defendant in any action brought under this chapter. The agency commencing the action pursuant to this section need only state the allegations and then show a sale at a lower price which raises the *prima facia* evidence of intent to destroy competition and hence liability under this section. It is, then, the defendant's burden to disprove the charges levied against him. This is contra to the common law which places the burden of prosecution on the party bringing the charges. It seems, therefore, that this section should be deleted or clarified to the extent that the burden of proof is on the prosecuting authority or the party making the allegations rather than the defendant. Further, the language gives "a person who intends or attempts to become a retailer" a cause of action. This is too broad in that it would allow anyone at least the potential of alleging they intended to become a retailer and certain actions on the part of another party precluded them from fulfilling this intent, hence encouraging spurious lawsuits.

Section 9, subsection (4) on page 9, beginning with line 2 and continuing through the word "buyer" on line 5 inflicts undue and undeserved punishment upon the consumer since it recites that "no person may claim the exemptions under

subsection (3)(a) through (3)(d) if he limits or otherwise restricts the quantity of such merchandise that can be purchased by any buyer." To so restrict a merchant would mean that if he has a sale offering, for instance, motor oil at one-half price he cannot restrict the quantity to any buyer and receive the exemptions. The first person in line could buy every single can of that motor oil at one-half price and those customers who not only wish to take advantage of that bargain but are entitled to do so would find no motor oil available to them. The same holds true for damaged or imperfect merchandise, or merchandise that is being discontinued. Any woman knows that imperfect, or slightly damaged merchandise, towels or hose, to name a couple, is often not detectable with the naked eye and is good quality merchandise being sold at a sale price only because the manufacturer and the merchant are both honest in labelling it imperfect or slightly damaged or being discontinued and offered at a very low price. Here again the first person in line could deplete whatever merchandise was being offered by buying the entire stock, leaving those consumers who wish to make purchases of that item without.

I am sure that it is not the intent of this legislature and particularly of this committee to punish either businessmen or the consumer but I submit to you that in its present form House Bill 304 accomplishes both and in my opinion is an unneeded, unnecessary and unwarranted piece of legislation which seeks only to impose additional brudensome paper work as well as many more rules and regulations on an already overregulated public and overregulated business fraternity.

Mr. Chairman, members of this committee, I suggest to you that the present two unfair practices statutes are working extremely well, for the benefit of both consumer and businessmen and there is no need for change. Therefore, it is my opinion that House Bill No. 304 should not pass.

For your consideration and your time, my sincere thanks.