MINUTES

MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON BUSINESS & INDUSTRY

Call to Order: By J.D. Lynch, Chair, on January 20, 1993, at 10:00 a.m.

ROLL CALL

Members Present:

Sen. J.D. Lynch, Chair (D)
Sen. Chris Christiaens, Vice Chair (D)
Sen. Betty Bruski-Maus (D)
Sen. Delwyn Gage (R)
Sen. Tom Hager (R)
Sen. Ethel Harding (R)
Sen. Ed Kennedy (D)
Sen. Terry Klampe (D)
Sen. Francis Koehnke (D)
Sen. Kenneth Mesaros (R)
Sen. Doc Rea (D)
Sen. Daryl Toews (R)
Sen. Bill Wilson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Bart Campbell, Legislative Council
Kristie Wolter, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 134
Executive Action: SB 82

HEARING ON SB 134

Opening Statement by Sponsor:

Senator Christiaens, Senate District 18, Great Falls, opened on SB 134, supplying prepared testimony. (Exhibit #1)

Proponents' Testimony:

Doug Vosberg, Pacific Hide and Fur Depot rose in support of SB

134. Pacific Hide and Fur is a multi-location business with 12 branches in Montana. The present statute which originated in 1919 states because Pacific has more than one location, they are subject to a suit by a single-location competitor any time Pacific outbids the competitor. The party bringing the suit doesn't carry the burden of proof; the defendant (Pacific) must prove they are not guilty. In normal situations, the person bringing the suit must prove guilt. If Pacific wins the suit, the competitor is encouraged to file another suit in a different situation because the competitor doesn't have to prove guilt. The statute, as it is currently written, discourages competition and doesn't benefit the public because it will not allow the public to attain the highest price possible. It gives the single-location firm the right to sue a multi-location firm if the single-location firm is out bid. Therefore, the statue allows the single-location firm to limit prices. SB 134 would allow for healthy competition. Pacific suggests the current statute be amended as proposed by eliminating paragraph 2, which would leave the burden of proof on the plaintiff. Changing the wording in paragraph 3 to "competing with" would encourage competition. Preventing any competitor from driving out another with unfair pricing would be maintained by keeping the statute on the books as amended.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

Senator Gage inquired about where the burden of proof will lay if SB 134 is passed. Doug Vosberg replied the burden of proof would lay with the plaintiff, or the person bringing the case.

Closing by Sponsor:

Senator Christiaens closed respectfully.

EXECUTIVE ACTION ON SB 82

Motion:

Senator Mesaros moved SB 82 DO NOT PASS.

Discussion:

Senator Klampe asked if there was any attempt to save any part of SB 82. Senator Lynch responded parts of SB 82 were saved.

Vote:

MOTION CARRIED 12 to 1 with Senator Lynch voting NO.

Discussion:

Greg VanHorsen announced the status of amendment work on SB 111 was ongoing.

Senator Lynch stated the Committee would wait a couple of days to vote on SB 111. The consensus was SB 111 would define a property manager and make it necessary for those who purport themselves to be property managers to be licensed.

ADJOURNMENT

Adjournment: 10:16 a.m.

Senator J.D. Lynch, Chair

Kristie Wolter, Secretary

JDL/klw

MEMORANDUM

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 1
DATE 1/20/93
BILL NO. SB 134

TO: Senator Chris Christiaens

FROM: Bruce A. MacKenzie

RE: Senate Bill 134 Amending Area Price Discrimination Statute

DATE: January 19, 1993

Montana Code Section 30-14-208 was initially adopted in Montana in 1913 probably in response to the Congress's efforts at the time preparing for the adoption of the Clayton Act in 1914. Section 2 of the Clayton Act prohibited territorial price discrimination. After a Federal Trade Commission study, however, Section 2 of the Clayton Act was found to be ineffective and in 1926 the Robinson Patman Act was enacted. The Robinson Patman Act eliminated the territorial basis for determining price discrimination and adopting a broad price discrimination provision for inter-state commerce.

State area price discrimination laws which restrict the sale of the same commodity in different localities in the state at a different price have survived as little Robinson Patman Acts. For the most part, any time an individual is engaged in a state's commerce in different localities they are most likely involved in interstate commerce and would be subject to the Robinson Patman Act. As a result these state statutes have fallen into disuse. It is important to note that the Robinson Patman Act requires more than proof of a difference in price. The Act requires proof that the pricing results in an "injury to competition" which entails more than injury to one competitor.

Area price discrimination statutes are not price fixing laws and as a general rule, are not intended to prevent consumers from being over-charged. They were enacted to prevent the destruction of competition by depressing prices in one locality where there is competition and offsetting the loss by raising prices in another locality where there is no competition. The real purpose of area discrimination statutes is to prevent unfair practices by which competition is stifled and monopolies are created. Most area price discrimination statutes relate to the sale of goods and not to the purchase of goods. Montana Section 30-24-208 is an exception to this in that it prevents purchasers of certain commodities from buying at different prices in different localities within the state.

The statute presents problems for a multi-community operation that is purchasing goods for its own manufacture or sale. If such a business pays a higher

rate or price in one locality than another, after making due allowance for the difference in the actual cost of transportation and for the difference in grade or quality of such article, such activity constitutes prima facie evidence of a violation. The business has the burden of proving that the higher price paid in one locality is not unfair discrimination. This is a significantly lower standard of proof for a prima facie case than is required under the provisions of the Robinson Patman Act. There is no requirement to prove "injury to competition" or that the prices paid are unfair or actually discriminatory.

The effect of such a statute is to expose multi-community businesses to lawsuits in which they must prove the prices they are paying in one locality to compete with a local business within that locality are not unfair. In other words, the mere fact of competition presents the potential for a lawsuit in any community where the business may purchase goods in competition with another business.

In Fairmont Creamery Company vs. Minnesota 274 US 1 (1927) the U.S. Supreme Court ruled unconstitutional a similar state statute which outlawed locality price discrimination by purchasers of dairy products for manufacture or sale. The Court declared the statute invalid as a violation of the freedom of contract because in effect it fixed uniform pricing and had no reasonable relation to the anticipated evil of high bidding to destroy competition.

The purpose of the statute is to protect the public by preventing unfair pricing which would destroy competition. The effect of the statute as presently written, however, is quite the opposite. Through the threat of litigation over any price difference, the statute results in companies doing business in multiple locations in the state having to pay a uniform price throughout the state regardless of market conditions in order to avoid costly litigation. This uniform price typically would not be based upon a competitive market but often on a location where there is no competition. Under the existing statute, a business with only one location could threaten a lawsuit and effectively hold the price paid by a multiple location competitor below its own without ever having to prove that the prices paid to the public by the competitor were meant to destroy the competition.

The amendments within Senate Bill 134 would require proof by a local competitor that the pricing scheme of the business with multiple locations is unfair and anticompetitive. This revision is in keeping with the proof required for business engaging in unfair sales practices as found in M.C.A. § 30-14-207(3) (sales prices must be contrary to the spirit and intent of the section). Such an amendment also recognizes the changes that have occurred in litigation procedures since 1913. When this statute was first enacted, a small business would have had a difficult time obtaining internal documents of its competitor relating to pricing methods. Today, with modern discovery rules, the documents are available to any business that brings such a suit through the use of a document production request. If the competitor is uncooperative, the court will enforce the request for documents.

Finally, the amendment makes it clear that it is a valid defense to the claim of unfair pricing if the price paid by a business is meant to "compete" directly with another business. In other words, it is a valid defense if a price paid to the public is higher than another business in the same locality if that price is paid to compete. To establish the defense under the current law the defendant must show that the price paid was designed only to "meet" the price paid by the competition. This makes it unclear whether the price could be higher than the competitor or simply equal. It seems contrary to public policy that the statute should restrict competition by fixing the price to that of a competitor. Therefore, a defense would be available if the company could show that a higher price was paid in a locality as a result of competition.

Remove Burden of Proof To the Plaintiff

DATE January 20

SENATE COMMITTEE ON Business & Industry

BILLS BEING HEARD TODAY: SB 134

Name	Representing	Bill No.	Check One Support	Oppose
N. E. Vosburg	Pacific Hide + Fur	134	X	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

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