

Mailing Date: May 7, 2003

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 02-0764
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

SHERRY DISTRIBUTORS, INC. : License No. ID-520
812 Water Street :
Meadville, PA 16335-3419 :

Counsel for Licensee: Francis X. O'Brien, Esquire
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Harrisburg, PA 17101

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OPINION

Sherry Distributors, Inc. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge Roderick Frisk ("ALJ"), wherein the

ALJ sustained the citation against Licensee and imposed a fine of four hundred dollars (\$400.00).

The citation charged Licensee with violation of section 431(b) of the Liquor Code [47 P.S. § 4-431(b)], in that on one hundred forty-nine (149) dates between June 7, 2001 and March 28, 2002, Licensee, by its servants, agents or employees, sold and/or delivered malt or brewed beverages to licensees not located within the geographical area for which distributing rights have been given it by the manufacturer or its primary importing distributors.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall not reverse the ALJ's decision unless he committed an error of law or abused his discretion, or the decision is not supported by substantial evidence.

The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion requiring something more than a scintilla creating mere suspicion of the fact to be established. Johnson vs. Pennsylvania Board of Probation and Parole, 706 A.2d 903 (Pa. Cmwlth. 1998); Chapman vs. Pennsylvania Board of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

It is Licensee's contention on appeal that the ALJ abused his discretion and committed an error of law in finding a violation. Specifically, Licensee argues that there was no sales by Licensee, a secondary importing distributor, in breach of a "territorial agreement" as that term is used in Liquor Code section 431(b) and that the exclusions by the primary importing distributor of certain specific licensed accounts from the licensees to whom Licensee, the secondary importing distributor, could sell were simply part of the "terms and conditions under which such products are to be resold" in the penultimate paragraph of Liquor Code section 431(b).

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") and Licensee submitted stipulated findings of fact and briefs in lieu of a hearing. The parties stipulated to facts as set forth in a Stipulation of Counsel dated October 8, 2002. That Stipulation, in its entirety, was adopted by the ALJ as the findings of fact set forth in the Adjudication.

Section 431(b) of the Liquor Code provides, in relevant part, as follows:

Each out of State manufacturer of malt or brewed beverages whose products are sold and delivered in this Commonwealth shall give distributing rights for such products in designated geographical areas to specific importing distributors, and such importing distributor shall not sell or deliver malt or brewed

beverages manufactured by the out of State manufacturer to any person issued a license under the provisions of this act whose licensed premises are not located within the geographical area for which he has been given distributing rights by such manufacturer. Should a licensee accept delivery of such malt or brewed beverages in violation of this section, said licensee shall be subject to a suspension of his license for at least thirty days: Provided, That the importing distributor holding such distributing rights for such product shall not sell or deliver the same to another importing distributor without first having entered into a written agreement with the said secondary importing distributor setting forth the terms and conditions under which such products are to be resold within the territory granted to the primary importing distributor by the manufacturer.

[47 P.S. § 4-431(b)].

Upon review of the stipulated facts and arguments presented by both Licensee and the Bureau, the ALJ remained convinced that the Bureau's interpretation of the application of section 431(b) is applicable. While Licensee strongly contends that there is no violation of section 431(b) as long as Licensee is selling within the territory for which its primary importing distributors have been granted rights from their respective manufacturers (i.e., Crawford County), section 431(b) is clear as to the requirement that the "terms and conditions" must be used to determine the specific circumstances under which certain products are to be resold within a territory under contract. The sales at issue were within the territory given it by the importing

distributors, although to licensees excluded by the importing distributor by contract. These sales breached the “terms and conditions” in the contract but do not constitute a violation of the Liquor Code. Upon review of the record including the factual stipulation of both counsel, the Board finds there is insufficient evidence to establish that a violation has occurred.

The territorial agreement in question stated between Licensee and Glenwood Beer Distributors, Inc. (“Glenwood”) stated, in relevant part

...Glenwood intends to extend authorization to Sherry [Licensee] to sell and distribute products of those Brewers/Suppliers described in Appendix A to ‘On–Premise’ Licensees and/or retail trade in the territory described as follows: CRAWFORD COUNTY, EXCLUDING OIL CREEK TOWNSHIP AND THOSE ACCOUNTS LISTED ON APPENDIX B

Appendix B of the agreement stated, in relevant part, “ON-PREMISES LICENSEES SPECIFICALLY EXCLUDED UNDER THIS AGREEMENT ARE: . . . ARLINGTON HOTEL. . .NIGHTHAWK’S TAVERN. . .” Licensee sold and/or delivered malt or brewed beverages to Arlington Hotel and Nighthawk’s Tavern.

The territorial agreement between Licensee and Peter C. Stubler, Inc. (“Stubler”) stated, in relevant part, in Paragraph II that

[t]he Purchaser [Licensee] hereby agrees and covenants that the Products obtained by the Purchaser from the Seller [Stubler]

pursuant to this Agreement shall be resold, transferred or distributed by the Purchaser only to the customers set forth in Exhibit B attached hereto, incorporated herein, and made a part hereof. The Purchaser further covenants and agrees that none of such Products will be sold, transferred or distributed by the Purchaser except in full compliance with the limitations contained in this paragraph, and that any breach of the provisions of this paragraph shall give the Seller the right to immediately terminate this Agreement.

Exhibit B of the Stubler agreement sets forth that

[a]s provided in paragraph II of the foregoing Agreement, the Purchaser shall have the right to sell and distribute the Products listed in Exhibit A to the following customers, provided, however, Purchaser recognizes that such rights are not exclusive and that other purchasers may be granted similar rights to sell and distribute such Products to the same customers.

Licensee sold and or delivered Stubler's malt or brewed beverage products listed in the agreement's Exhibit A to the following retail licensees not listed in the agreement's Exhibit B: Butch's Pub, Chipper's Pub, Corner Tavern, Cussewago Inn, Dog Pound, Double Barrel Saloon, Holiday Inn Express, Hunting and Fishing Club, Kafferlin's Tavern, Northstar Tavern, Otter's Pub, Ran's Taylor Hose Company, Traxside Tavern & Restaurant and Whisper's.

Because Licensee was given the right to sell in a certain geographical territory (although not an exclusive right), it is considered a secondary importing distributor. [47 P.S. § 4-431(b)]. Agreements between primary

and secondary importing distributors are required not so that agreements exist to exist but because examination of such agreements allows the Commonwealth to observe and trace transactions within the beer distribution system.

Recognizing that the sales referenced in the allegation did take place during the time period specified, it is nevertheless clear that the sales took place within the geographical area for which distributing rights were given to licensee – Crawford County. Accordingly, Licensee did not breach the “geographical territory,” but rather, with breached the terms and conditions under which such products were to be resold. A review of the record now before the Board reveals that Licensee admitted to the Bureau officer that it sold and/or delivered malt or brewed beverages in violation of the subject two (2) territorial agreements on the dates in question and to the retail licensees in question. However, the Board refuses to equate retail licensees as defining the geographical territory in the subject territorial agreements where geographical territories were clearly delineated.

Based upon the evidence, the Board finds that the parties have fully complied with the requirements of Liquor Code section 431(b) with the agreements in question. The parties have entered into written agreements,

and Licensee has resold the products only within the geographical territory granted to it by the primary importing distributors. The Liquor Code does not make a breach of the further contractual limitation a violation of the Liquor Code. Any such breach of further contractual limitations is a private dispute between the primary importing distributor and the secondary importing distributor to be settled in the courts of common pleas. [47 P.S. § 4-431(d)(4)].

Based on the foregoing, the decision of the ALJ is reversed.

ORDER

The decision of the ALJ is reversed.

The appeal of Licensee is sustained.

The citation is dismissed.

Board Secretary