

Mailing Date: April 9, 1999

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR
PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 98-1333
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W4-184575
v.	:	
	:	LID - 8824
JET DISTRIBUTORS INC	:	
T/A BEER & POP WAREHOUSE	:	
833 E. PITTSBURGH & MCKEESPORT	:	
BLVD	:	
ROOM 21-B	:	
NORTH VERSAILLES PA 15137-1701	:	
	:	
ALLEGHENY COUNTY	:	
LICENSE NO. ID-3757	:	

BEFORE: JUDGE ROBERT F. SKWARYK

APPEARANCES:

For Bureau of Enforcement
Stanley J. Wolowski, Esquire &
Nadia Vargo

For Licensee
Martha S. Helmreich, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on July 24, 1998, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Jet Distributors, Inc. t/a Beer & Pop Warehouse, License Number ID-3757 (hereinafter Licensee).

The citation charges Licensee with violation of Section 493(24) of the Liquor Code [47 P.S. §4-493(24)], in that on June 25, 1998, Licensee, by its servants, agents or employes, offered and/or gave things of value as an inducement to purchase alcoholic beverages.

The investigation which gave rise to the citation began on June 25, 1998 and was completed on June 25, 1998; and notice of the violation was sent to Licensee by Certified Mail on July 1, 1998. The notice of violation was received by Licensee on July 2, 1998.

A consolidated evidentiary hearing with Citation Numbers 98-0912, 98-1003, 98-1018, 98-1035, 98-1364, 98-1365 and 98-1368 was held on this matter on Monday, October 19, 1998 in Pittsburgh, Pennsylvania.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. Licensee is corporation located in Allegheny County, Pennsylvania and holds Importing Distributor License Number ID-3757. (N.T., 6)

2. On March 7, 1994, The Commonwealth of Pennsylvania by the Attorney General, David Trone, and Retail Service and Systems agreed that David Trone and Retail Service and Systems and any other corporation licensed by the PLCB may coordinate joint advertising if those advertisements state explicitly that the distributors are independently owned and operated. (By stipulation - N.T., 43-45)

3. On July 21, 1997, John E. Trone, Case Beer & Soda Outlet, Inc., t/a Beer World, 520 S. 29th St., Harrisburg, PA 17104 sent a letter and proposed ad to the Office of Chief Counsel, PLCB, requesting the issuance of an advisory opinion letter on its legality. (N.T., 38 - Exhibit L-C)

4. On August 28, 1997, the Office of Chief Counsel issued LCB Advisory Letter No. 97-299 that the proposed ad would be permitted for home trade purchases only, but that quantity discounts may not be given to home trade purchases. (N.T., 38 - Exhibit L-D)

5. Beginning approximately February 1998 through September 1998, Licensee, by its consultant, Retail Service and Systems, placed ads every Monday and Thursday in the Pittsburgh Post Gazette which ran for two weeks. (N.T., 15-16, 19, 70-72, 79-80)

6. The February through September 1998 ads were similar to the ad submitted on July 21, 1997 by John E. Trone, Case Beer & Soda Outlet, Inc., t/a Beer World, 520 S. 29th St., Harrisburg, PA 17104 to the Office of Chief Counsel, PLCB requesting issuance of an advisory opinion letter on its legality. (N.T., 38 - Exhibit L-C)

7. As part of the investigation, Enforcement Officer Lewis removed a coupon from Licensee's Pittsburgh Post Gazette newspaper ad dated June 15, 1998 for a case of Natural Light beer costing \$6.99 (N.T., 60-61, 70-71 - Exhibits C-14 and C-15)

8. On June 25, 1998 at approximately 12:00 p.m., Enforcement Officer Lewis entered the licensed premises in an undercover capacity, took a case of 12 ounce bottles of Natural Light beer from a pullet and took the pullet to the cashier who rang up the price of \$7.99. (N.T., 61-62)

9. After the sale was rung up on the cash register, Enforcement Officer Lewis presented the coupon to the cashier who then deducted \$1.00 from the cash register total equaling \$6.99, which was the price advertised in the coupon, plus tax. (N.T., 62-63, 66-67 Exhibits C-15 and C-16)

10. Licensee used the ads and coupons for customer feedback accounting, and to get people to come in and buy its products. (N.T., 72, 76, 79, 85)

11. The number listed on the coupon is programmed into the cash register and deducts the difference of the coupon price from the regular price, as a discount. (N.T., 75-76, 83 – Exhibit C-16)

12. Licensee's consultant issued a policy memorandum to give a home trade customer the advertised lower coupon price for the beer if he asked for it without the coupon; however, would not give the lower price if he did not ask for it. (N.T., 72-73, 81-82)

13. Licensee also has mail-in manufacture's rebates available to anyone who comes in the store. (N.T., 76-77)

14. On May 29, 1998, the Office of Chief Counsel issued LCB Advisory letter No. 98-183 to John Trone, Case Beer & Soda Outlet, in which it referred to LCB Advisory No. 97-299 but advised that a distributor may not require home trade purchasers to present a coupon in order to obtain the "special" price. (N.T., 40-41 – Exhibit C-9)

CONCLUSIONS OF LAW:

Sustained as charged.

DISCUSSION:

A consolidated hearing with Citation Numbers 98-0912, 98-1003, 98-1018, 98-1035, 98-1364, 98-1365 and 98-1368 was held with agreement of the parties because of the singular nature of the charge in each case.

Counsels for the Bureau and Licensee submitted briefs in each case.

These cases involve four importing distributors trading as "Beer World" in Allegheny County, acting in concert with Retail Service and Systems as their consultant, to advertise redeemable coupons in a local newspaper for limited case sales of several brands of beer at lower prices than their respective sales prices posted on the "Beer World" sales floors.

In her brief, counsel for Licensee argued that such advertising is protected commercial free speech, and that the Board authorized the coupons by a legal opinion. Counsel for the Bureau argued that the statute is constitutionally valid, and the newspaper coupons are illegal when a customer with a coupon receives a lesser price than the posted sales floor price.

Between April 2, 1997 and August 28, 1997, the Board issued a series of four legal opinions on advertising coupons submitted by John E. Trone, Case Beer & Soda Outlet, t/a Beer World in Harrisburg, PA. (Exhibits L-A, B, C and D) The last Opinion, No. 97-299, authorized an advertisement stating the lower price of the product with a case limit and “additional cases at a higher price.” (Exhibits L-C and D) Prior to this investigation on May 29, 1998, the Board issued a fifth opinion, Opinion No. 98-183, advising John Trone that a Licensee may not require home trade customers to present a coupon to obtain the lower price. (Exhibit C-9)

Section 211.1 of the Liquor Code provides as follows:

LEGAL OPINIONS. –

Upon written request by a licensee, the board or its counsel shall issue a legal opinion regarding any subject matter relating to this act or any regulation promulgated pursuant to it. This legal opinion shall be binding on the enforcement bureau.

In the cases presently before me, the advertised coupons used by the enforcement officers to receive a price reduction in cases of beer fail to include the phrase, “additional cases at (x) dollars,” (x) being the regular higher price. (Exhibits C-5 and C-14). Therefore, they are not the same as those authorized by the Board, and Section 211.1 does not bind the Bureau in this prosecution.

Section 493(24) of the Liquor Code , “Things of value offered as inducement,” provides, in part, as follows:

It shall be unlawful –

For any licensee under the provisions of this article, or the board or any manufacturer, or any employe or agent of a manufacturer, licensee or of the board,...to offer or give or solicit or receive anything of value as a premium or present to induce directly the purchase of liquor or malt or brewed beverage, or for any licensee, manufacturer or other person to offer or give to trade or consumer buyers any prize, premium, gift or other inducement to purchase liquor or malt or brewed beverages... This section shall not prevent any manufacturer or any agent of a manufacturer from offering only on licensed premises and honoring coupons which offer monetary rebates on purchases of wines and spirits through State Liquor Stores and purchases of malt or brewed beverages in accordance with conditions or regulations established by the board. Further, no manufacturer or any agent of a manufacturer shall honor any coupons without proof of purchase in the form of a sales slip or receipt attached to the coupons...(Emphasis added)

I find the four Beer World Licensee gave money in the form of instore instant coupon rebates to consumer buyers to induce them to purchase its beer products. Section 493(24) allows manufacturers to give such rebates, but importing distributors are not permitted to give rebates¹.

PRIOR RECORD:

Licensee has been licensed since May 14, 1985, and has had four prior violation(s) since July 1, 1987, the date of establishment of the Office of Administrative Law Judge, to wit:

Citation No. 88-0129. Fine \$1,200.00. Waiver of hearing.

1. Purchased malt or brewed beverages from secondary importing distributors located within assigned areas which do not include the premises.
2. Sold and/or delivered malt or brewed beverages to licensees not located within the geographical area for which distributing rights have been given you by the manufacturer or the primary importing distributor.
3. Received allowances or rebates.
4. Offered and/or gave inducement to purchase malt or brewed beverages.

Citation Nos. 89-2062 and 90-1826 consolidated. Dismissed. Bureau's appeal to Board sustained. Licensee's appeal to Common Pleas Court reversed Board's order and reinstated OALJ's order. Bureau's appeal to Commonwealth Court reversed Common Pleas Court's order. Licensee's appeal to Pennsylvania Supreme Court affirmed Commonwealth Court's order and remanded to OALJ for penalty. One day suspension.

1. Sold malt or brewed beverages in original containers not as prepared for the market by the manufacturer at the place of manufacture.

¹ Section 498(c) , "Unlawful Advertising" provides, as follows:

- (c) Prices that are advertised or displayed on the licensed premises shall be those that are in effect at the time of the advertisement or display.

Licensees did not advertise their lower coupon prices inside the licensed premises. Although not charged with violating Section 498(c) of the Liquor Code, such a failure may be a violation of this section.

JET DISTRIBUTORS, INC.
CITATION NO. 98-1333

Citation No. 91-0851. Dismissed. Bureau's appeal to Board sustained. Licensee's appeal to Common Pleas Court reversed Board's order and reinstated OALJ order. Bureau's appeal to Commonwealth Court reversed Common Pleas Court's Order. Licensee's appeal to Pennsylvania Supreme Court affirmed Commonwealth Court's order and remanded to OALJ for penalty. One day suspension.

1. Sold malt or brewed beverages in containers not as prepared for the market by the manufacturer at the place of manufacture.

Citation No. 97-0105. Fine \$1,000.00. Waiver of hearing.

1. Failed to post in a conspicuous place on the outside of the licensed premises, a notice of suspension. January 1, 1997.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or a fine of not less than \$50.00 or more than \$1,000.00 or both for violations of the type found in this case.

After due consideration of the circumstances giving rise to the citation, a fine of \$1,000.00 will be imposed.

ORDER:

THEREFORE, it is hereby ordered that Licensee, Jet Distributors, Inc. t/a Beer & Pop Warehouse, pay a fine of \$1,000.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

The fine must be paid by Treasurer's Check, Cashier's Check, Certified Check or Money Order. **Personal checks, which include business-use personal checks, are not acceptable.** Please make guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg PA 17110-9661

Dated this 5th day of April, 1999.

Robert F. Skwaryk, J.

cbm