STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2181 April 16, 1975

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ITEM

STATE OF NEW JERSEY
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1. APPELLATE DECISIONS - ALL STATE WINE & SPIRITS, INC. et al v. LAIRD'S, INC.

All State Wine & Spirits, Inc. et al,

Petitioners,

v.

Laird's, Inc.,

Respondent.

CONCLUSIONS and ORDER

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Clapp & Eisenberg, Esqs., by Jerome C. Eisenberg, Esq., Attorneys for Petitioners
Friedman & D'Alessandro, Esqs., by Edward G. D'Alessandro, Esq., Attorneys for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Petitioners New Jersey plenary wholesale licensees, filed a petition with the Director of this Division pursuant to Rules 2 to 5, inclusive, of State Regulation No. 15A, by alleging that respondent, Laird's, Inc., a distiller and rectifier of alcoholic beverages discriminated against them in not permitting distribution of Laird's products, which discrimination was violative of N.J.S.A. 33:1-93-6 et seq. The said petition was filed pursuant to the said statute and regulation, and a hearing was held in this Division.

Respondent Laird's, Inc. the holder of a limited distillery license, a rectifier and blender license, a public warehouse license and a transportation license is a century old company, located in the southern part of our State, which manufactures an apple brandy popularly known as "Apple-Jack". Its products were distributed for many years through licensed wholesale distributors, of which appellants were numbered. However, in the early part of 1974, it determined to limit its distribution outlets in New Jersey to five particular distributors, and sought an advisory opinion of the then-Director that it might do so.

In an ex parte opinion (reported in Bulletin 2139, Item 6), the Director concluded that, in his opinion, from "the proofs submitted" Laird's products are not "nationally advertised" and "are not embraced within or subject to the provisions of N.J.S.A. 33:1-93.6 and State Regulation No. 15A."

Following the Director's Advisory Opinion, Laird's promptly altered its mode of distribution in New Jersey, restricting its representative wholesalers to five; the remaining wholesalers, appellants herein, thereupon filed this appeal.

The applicable statute, N.J.S.A. 33:1-93.6 provides that:

> "There shall be no discrimination in the sale of any nationally advertised brand of alcoholic beverage other than malt alcoholic beverage, by importers, blenders, distillers, rectifiers and wineries, to duly licensed wholesalers of alcoholic beverages who are authorized by such importers, blenders, distillers, rectifiers and wineries to sell such nationally advertised brand in New Jersey." (underscore added)

It is uncontroverted that Laird's is a distiller, rectifier and blender and holds State licenses for such purposes. In his ex parte determination aforesaid, the Director held that:

> "In order for this licensee [Laird's] to become subject to the provisions of the aforementioned statute, it must affirmatively appear that its product or products are nationally advertised.
>
> . . .
>
> The criteria for establishing that the products are nationally advertised are: (1) the brand must be widely advertised in the major areas of distribution; (2) the brand must be advertised in national (not local or regional) issues of magazines; and (3) the brand must be consistently advertised in newspapers of national scope as opposed to local or regional newspapers."

At the hearings held in this Division in the matter, the petitioners were afforded ample opportunity to establish that Laird's is, in fact, a manufacturer and a distributor of a nationally advertised brand, and that its refusal to sell its products to petitioners herein, was not in violation of the subject statute.

At the outset of the hearings, numerous exhibits were introduced into evidence, which reflected, among others, the advertising lineage of Laird's for the past decade, and a comparable sales percentages among the varies States. From these, it appears that there has been no magazine advertising by Laird's since 1968, and then, and prior thereto, beginning with 1963, the magazine lineage was limited to the "eastern region editions of 'Look' and

'Life' magazines." In 1958, there was a part-column advertisement inserted in the "New Yorker" magazine. Newspapers carrying Laird's advertising are located solely along the eastern seaboard of the United States and have a local circulation. The New York Times is the only newspaper with more than local circulation in which some advertising was carried.

The business generated by Laird's, as indicated in one of the exhibits, was restricted to the States on the eastern seaboard from Maine to Florida; and this accounted for ninety percent of the business. All other States in which Laird's product is sold account for the remaining ten percent.

The crucial issue is whether Laird's is, in fact, a nationally advertised brand. Petitioner and respondent have each introduced an expert in support of its contention.

Testifying for petitioner, Sumner Wyman, qualified as an expert in the field of advertising as related to the alcoholic beverage industry, by virtue of his long association with the industry and its advertising media. Following a decade as associate publisher of several trade journals concerned with varied aspects of the sale of alcoholic beverages, he became associated with an advertising agency whose accounts included numerous brand-name brands of liquor.

Given the hypothesis that (a) there had been continuous newspaper advertising in cities near to the eastern seaboard, including insertions in the New York Times; (b) that labeled cartons had been shipped into thirty of our fifty States; and (c) there was wide circulation of advertising matter such as recipe books and paper napkins, he concluded that this constituted "national advertising". In his opinion, national advertising could be accomplished through the circulation of collateral matter as well as by newspaper advertising, and such circulation, when accompanied by advertising in the New York Times, represented an attempt at obtaining national advertising.

Laird's introduced the expert testimony of Kenneth Caffrey, Senior Vice-president of Ogilvy & Mather, a national advertising agency whose clients include National Distillers Corporation. He has worked on an account of Browne Vintners, Inc., advertising their products "White Horse Scotch" and "Old Crow". He also is a consultant to the Commonwealth of Puerto Rico with respect to the advertising program of its rum distilling industry.

He defined "national advertising" as the placement of commercial product advertising through national media. For advertising to be considered "national" in scope, there must be coverage in all of the States.

The effect of national advertising is regularly tested to determine the "awareness level" among the prospective users of the product advertised. To increase such "awareness levels" two techniques are used: "flighting" or "pulsing" programs is one technique, which employs a barrage of advertising to encompass a certain

time period, or an area, or both. An alternative technique is repetitive advertising designed to build the "awareness level" by constant advertising. He described the use of such techniques as being dependent upon particular advertising goals.

Laird's advertising program, in his opinion, is definitely not national advertising because the media used would not, in any way, obtain national coverage. The New York Times is not national in its scope, and is not considered by advertising agencies to have, what he termed, national reference.

To a question related to an advertisement contained in the "New Yorker" magazine, he maintained that a single advertisement in that periodical would have little or no residual effect, and a national advertising campaign would not result from a single advertisement in that publication. He also denied that a mere label on the exterior of a carton containing a product could be considered to be national advertising; nor would such exterior labeling be a significant instrumentality in developing an awareness level.

Upon an analysis of the advertising program and budget of Laird's reflected in the testimony of Laird's sales manager, and from the information contained in the exhibits, Caffrey determined that Laird's is not a nationally advertised brand. No basic national advertising technique is employed; there is neither "flighting" nor "pulsing" advertising; and the sum actually spent in advertising, estimated at $35,000, is totally inadequate to obtain national advertising coverage. For the size of the company and the nature of the product, he believed that no effective national advertising program could be realized without a minimum expenditure of $100,000.

On cross examination, Caffrey admitted that an advertising program concentrated in the few "national" newspapers, examples of which are "National Observer" and "Christian Science Monitor", could conceivably come within the $35,000 budget of Laird's. However, he asserted that such expenditure would not be consonant with the "Hendry" formulae which relates to the costs of advertising and the anticipated response therefrom.

Petitioners introduced copies of extracted pages from the "Standard Directory of Advertisers - 1974" published by the National Register Publishing Company containing information with respect to 17,000 corporations. On one page is listed the name of the new president of Laird's, and on another page there is contained a listing of Laird's (Laird & Company), indicating its distributiin to be "national". As no testimony was introduced to support the alleged accuracy or authenticity of the contained information, I find that this exhibit was incompetent and without evidential substance.

Several representatives of the petitioning companies testified that the elimination of their companies as wholesalers of Laird's caused economic damage far higher than the total of Laird's sales alone. They asserted that in view of the fact that Laird's sales usually represent a one or two bottle transaction

when sold to a retailer and a minimum sales order is $50.00, by not being able to offer Laird's, their salesmen could not generate remaining orders to equal the minimum sale requirements. There was further testimony by them that since Laird's is the only distiller of apple brandy other than imported brands, the elimination of these wholesalers constituted discrimination under the applicable statute.

The president, controller and sales manager of Laird's testified that the reduction in the number of wholesalers to five was the result of sales analyses showing a year-to-year drop in the profitability of Laird's product. Such reduction was calculated to obtain greater exposure of its product by a limited number of wholesalers who, presumably, would be more able to concentrate on developing wider sales.

The numerous witnesses offered by all parties and the voluminous testimony developed is not set forth in detail because it led to an in-depth presentation of the internal affairs of Laird's but had little relationship to the crucial issue of whether or not the subject product was a nationally advertised brand.

Laird's contends that it is fighting for economic survival which requires that it reduce the number of wholesalers handling its products. The petitioners contend that Laird's, like so many specialized products before it, is merely the victim of change in public taste.

While much of the voluminous testimony adduced indicated a prospective economic paralysis of Laird's resulting from decreased sales of its products in New Jersey, there was no evidence which established that by reducing the number of wholesalers, its affairs would achieve new vitality. It sought to overcome the charge of discrimination by the averment that such major change was the result of a business decision and was not specifically directed against any of the eliminated wholesalers. By such posture, it contends that the precedent established in American B.D. Co. v. House of Seagrams, 107 N.J. Super. 264, aff'd 56 N.J. 164 would be inapplicable. Such contention is without foundation.

American, supra, is clear in its holding that "an importer, distiller or rectifier should have the right to terminate a business relationship with a wholesaler who disparaged the product, showed unfair preferment in sales effort for those of a competitor, or engaged in improper or proscribed trade practices."

None of the proofs supplied by Laird's tended to show other than it made a subjective decision to alter the roster of wholesalers in an effort to increase sales. Such action, for a nationally advertised company, is unquestionably discriminatory. However, the statute is inapplicable with respect to brands which are not nationally advertised.

As set forth in the ex parte order of the then acting Director, hereinabove set forth, the criteria established for national advertising are: (1) the brand must be widely advertised in the major area of distribution. The proofs submitted adequately show that Laird's does widely advertise in the major

areas of distribution; (2) the brand must be advertised in national (not local or regional issues) magazines; and (3) the brand must be consistently advertised in newspapers or periodicals of national scope as opposed to local or regional newspapers.

Respecting the second and third criteria, there was no proofs whatever which established that Laird's advertised in national magazines other than a solitary advertisement placed in the New Yorker magazine in 1968. There was also no proof that Laird's ever advertised in newspapers of national scope. The New York Times, by its own masthead, is not a newspaper of national scope (although its editorial views are nationally respected).

The thrust of Wyman's testimony was illustrated by the response to the following question:

> "Q So the crux of your testimony, Mr. Wyman, is the fact that this Laird's company does have distribution in 33 or 34 States and is what makes it a national company, not so much the advertising policy or practice. Is that a fair conclusions?
>
> A Yes, sir, that is a fair conclusion. However, I think you have to combine with that the fact that they have wholesalers in 35 States promoting their brand constantly."

The proofs did indicate that Laird's is sold in more than thirty States; however, there was no proof whatever as to what advertising, if any, wholesalers who carry Laird's products did in those States. Consequently, it must be concluded that the opinion of Wyman was greatly influenced by the number of States where Laird's products may be found, rather than the existence of any advertising related to such distribution.

Caffrey, the expert testifying on behalf of Laird's, appeared to project a far more professional approach to questions posed. In arriving at his conclusion that Laird's was not nationally advertised, he gave consistent weight to the business of Laird's as well as its advertising program. He alluded to criteria similar to those outlined by the then acting Director in the ex parte opinion referred to hereinabove, and from his testimony, such criteria were definitely not met either by Laird's or, if based on the same criteria, by any distiller whose area of business was so limited.

In sum, I find, from all of the proofs and the totality of the record herein, that Laird's is not a nationally advertised brand of alcoholic beverages and, thus, is not subject to the provisions of N.J.S.A. 33:1-93.6 et seq.

It is, accordingly, recommended that the petition herein be dismissed.

Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, written exceptions to the Hearer's report and argument in support thereof, were filed by the petitioners. Answering argument to the said exceptions and argument, and cross-exceptions were submitted by the respondent. An answer to the said cross-exceptions was, thereupon, filed by the petitioner.

The Hearer's report recommends a finding that Laird's, Inc. products are not a nationally advertised brand of alcoholic beverages, and, thus, Laird's is not subject to the provisions of N.J.S.A. 33:1-93.6 et seq.

In the course of his recital of the proofs, the Hearer concluded that, if Laird's, Inc. were a nationally advertised company, its action in removing the petitioners from its list of distributors in New Jersey, would be discriminatory, and in violation of the subject statute. However, he made no specific recommendation with respect thereto, because of his recommended finding that the statute was inapplicable with respect to Laird's.

The exceptions argue (1) "that the wide distribution and consumer acceptance of Laird's, Inc. Applè-Jack compel the conclusion that it is a nationally advertised brand of alcoholic beverage covered by the Statute"; and (2) "the extent of Laird's, Inc. advertising is sufficient to bring it within the statutory definition of a nationally advertised brand of alcoholic beverage."

I shall first discuss the contention that the Hearer was in error in recommending a finding that Laird's' advertising was not sufficient to bring it within the statutory definition of a "nationally advertised" brand of alcoholic beverage.

In order to sharpen our understanding of the true legislative meaning of the term "nationally advertised brands of alcoholic beverages", it would be helpful to review the genesis of this specification in the legislation. This section (N.J.S.A. 33:1-93.1 et seq.) was adopted during war-time, in 1942, when there was a shortage of alcoholic liquors, particularly Scotch, which was imported from abroad. The shortage was primarily and almost exclusively, in the well known nationally advertised products. As explained by Justice Francis in his concurring opinion in Canada Dry Ginger Ale, Inc. v. F & A Distributing Co., 28 N.J. 444 (1958), at p.460:

> "It is a matter of common knowledge that in the past various brands of liquor were in shorter supply or greater demand than others. When such a situation exists, if those brands are localized in the hands of one or a few wholesalers, obviously, retailers will be more anxious to deal with him or them in order to obtain a supply of the scarce commodity, and, therefore, will be inclined to purchase their other related requirements of alcoholic beverages from him or them to the detriment of the not so

> favored wholesalers. The Legislature may well have believed that such a situation would produce practices known to be inimical to the public interest. And when it is recalled that, in 1942, when the statute was adopted, the country was at war and imported liquors were unusually scarce, it is not difficult to conjure up the reason for the legislative desire to secure an equitable basis for competition among all wholesalers."

Thus, it is apparent why this legislation was directed against "nationally advertised" brands of alcoholic liquors.

See Hoffman Import & Distributing Company v. Frederick Wildman & Sons, Bulletin 1682, Item 1.

It is common knowledge that the situation in the alcoholic beverage industry in 1975 is significantly different in terms of the supply and availability of alcoholic beverages, from that which existed in 1942 and the war years. So, too, must "nationally advertised brand" be more liberally defined in the absence of such scarcity of alcoholic beverages.

Webster's Third New International Dictionary defines "nationally" as "(b) with regard to, or in terms of a nation as a whole; on a national scale; throughout a nation." "National" involves the nation as a whole, as distinguished from its subordinate areas.

In Hoffman Import & Distributing Co. v. Peerless Importers, Inc., Bulletin 1584, Item 1, the matter of national advertising was first considered in this context by the then-Director. In that case, advertisements of the products were then being carried in the New York Times and New York Herald Tribune. The Director there held:

> "...The intent of the Legislature, as I interpret the Introductory Statement to relevant provisions of this statute, is that widely known brands of alcoholic beverages, as distinguished from local brands, shall be embraced within the sweep of its provisions, where the same are nationally advertised." (Emphasis supplied)

The word "national" contemplates an activity of nation-wide scope. In Re Foundation for Diarrheal Diseases, 164 N.Y.S. 2d 177, 178; National Labor Relations Board v. Highland Park Manufacturing Co., 341 U.S. 322, 328; 95 L. Ed. 969.

In Hoffman, supra, (Bulletin 1584, Item 1) the Director stated that national advertising may be effected in several ways: (1) by the use of such media as nationally circulated newspapers, magazines, television and radio; (2) by advertising in leading newspapers circulating in the various major geographical areas of the country; and (3) or by a combination of both. However, if the local newspapers are used as the means of national advertising,

a plan designed and geared toward nation-wide coverage must be developed. Either or both methods may be supplemented by nation-wide billboard and even foreign language newspaper advertising--specifics designed to assure broad national coverage.

It is well-recognized that the more usual practice is to engage the services of advertising agencies dealing with national advertising. While most nationally advertised brands operate in this manner, it is not an exclusive procedure.

Such national advertising is of the institutional type, as distinguished from point-of-sale advertising, and is designed to create a favorable image of the product and the integrity of the manufacturer or producer. Cf. State Wholesale Grocers v. Great Atlantic & Pacific Tea Co., 154 F. Supp. 471 (N.D. Ill. 1957), affirmed in part and reversed in part on other grounds, 258 F. 2d 831 (7th Cr. 1958), cert. denied 358 U.S. 947, 3 L. Ed. 2d 352 (1959).

My review of the testimony adduced herein finds support in Laird's' contention that its products were regionally advertised in States along the eastern seaboard. In fact, 90% of all the sales were made in the eastern seaboard region with 67.2% of the 1973 sales concentrated in New York, New Jersey and Pennsylvania. This figure was essentially the same for the years from 1963 to 1973.

The record also shows that the advertising was concentrated primarily in New Jersey and North Carolina. In New York, there were limited and infrequent advertisements in the New York Times in the years 1970-73.

There was some difference of opinion as to whether advertising in the New York Times constitutes national advertising. In this connection, it was noted that 81.7% of the circulation in the New York Times is contained in New York, New Jersey and Pennsylvania; 9.4% is regionalized in the north eastern states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut; and 4.4% is contained in the states of Delaware, Maryland, the District of Columbia, West Virginia, South Carolina, Georgia and Florida. The other area of the country amounts only to 4.5% of its circulation.

A preponderance of the advertisements in the New York Times is geared to regional appeal-- especially to the New York metropolitan area.

With respect to the magazine advertisement, the proofs show that there was no magazine advertisement between 1968 through 1973. In 1967 there was one advertisement in the eastern regional circulation of Look magazine. Life magazine also carried an advertisement in 1964, 1965 and 1966 in its limited regional edition.

An important and, indeed, essential component, definitively embraced in a "nationally advertised" brand is recency of

exposure. In order to make national advertising meaningful, it must be current. I find that, in this respect, Laird's advertising lacked this essential characteristic.

Furthermore, as the Hearer's report recites, the advertising budget of Laird's, Inc., estimated at $35,000.00, is totally inadequate to obtain nationally advertised coverage. It cites the testimony of Kenneth Caffrey, a national agency executive, with impressive credentials who stated that a minimum expenditure of $100,000.00 is essential for a national advertising program.

Petitioners apparently confuse national distribution with national advertising. If the Legislature intended to use the distribution of products as a criterion, they would have so stated and included that term in the Act.

Even if distribution were to be considered as a measure, it is clear, from the record, that at least 90% of all sales were made in the eastern seaboard region; and this pattern has been the same for the last ten years.

The petitioners elicited the testimony of Sumner Wyman, an advertising executive, who testified that the mere fact that Laird's products are shipped to some thirty-one states and nothing more, constitutes "national distribution and national advertising". But Laird's pointed out that, in the State of Texas, which was one of those States which this witness said had national exposure, only one hundred cases were shipped, and then, only to one city, San Antonio.

It was, also, developed that in only one-half of the thirty-one states were there more than 200 cases of Laird's products sold. In fact, in a number of states, less than one hundred cases were sold in 1973.

I find that, even in terms of distribution, this product is neither fully nationally accepted, nor is it distributed in most of the major geographical areas in this country. Cf. Hoffman Import & Distributing Co. v. S.S. Pierce Co., Bulletin 1826, Item 2 (1968), affirmed by the Appellate Division in an unreported opinion, recorded in Bulletin 1881, Item 1. From the totality of the record herein, I find that Laird's, Inc. is not a nationally advertised brand of alcoholic beverages and thus, is not subject to the provisions of N.J.S.A. 33:1-93.6 et seq.

I have fully evaluated the exceptions submitted by the petitioners and find that they have either been correctly resolved in the Hearer's report or are lacking in merit.

Having thus concluded, I find it unnecessary, indeed, irrelevant and immaterial, to reach the matter of alleged discrimination, by Laird's, against the petitioners which the Hearer discusses in relation to products that would come within the orbit of the said Act and State Regulation No. 15A.

Therefore, I shall not consider the matter raised by Laird's in its cross-exceptions, which refers to the matter of the aforesaid alleged discrimination nor will I consider the answer filed by the petitioners to the said cross-exceptions.

One further matter: In the exceptions, the petitioners argue that they were denied due process because they were allegedly not "afforded" the opportunity "to prepare adequate proposed findings supported by the evidence". However, on January 16, 1975, I entered an order after oral argument before me on the return date of a petition, granting interim relief pending the final determination of this matter. The order required that Laird's fill petitioners' purchase orders of its products until the said final determination. Therefore, I find that petitioners were given adequate opportunity to make a full presentation and, thus, were not denied due process. This contention is devoid of merit.

Having carefully considered the entire record herein, I conclude that petitioners have not sustained the burden of establishing, by a preponderance of the evidence, that the respondent is a manufacturer and a distributor of a nationally advertised brand of alcoholic beverages, and, thus, subject to the provisions of N.J S.A. 33:1-93.6 et seq. I, therefore, concur in the Hearer's recommendation and shall dismiss the petition.

Accordingly, it is, on this 24th day of February 1975,

ORDERED that the petition filed herein be and the same is hereby dismissed; and it is further

ORDERED that my order dated January 16, 1975 granting ad interim relief be and the same is hereby vacated.

Leonard D. Ronco
Director

2. DISCIPLINARY PROCEEDINGS - SALE TO MINOR - LICENSE SUSPENDED FOR 45 DAYS.

In the Matter of Disciplinary Proceedings against

To-Glo Corporation t/a La Chateau Lounge & Freda's Package Goods & La Costa Motel
4000-4012 Landis Avenue
Sea Isle City, N.J.,

Holder of Plenary Retail Consumption License C-4, issued by the Board of Commissioners of Sea Isle City.

CONCLUSIONS and ORDER

McGahn and Friss, Esqs., by Patrick T. McGahn, Jr., Esq., Attorneys for Licensee
Carl A. Wyhopen, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charge:

> "On Saturday, July 13, 1974, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to a person under the age of eighteen (18) years, viz., James J.M. ---, age 15; in violation of Rule 1 of State Regulation No. 20."

In substantiation of the said charge, the Division produced the following witness, James J.M.---, who testified that he was born on October 5, 1958. He was, therefore, fifteen years of age on the date mentioned in the charge.

ABC agent D testified that, accompanied by agents P and C, he arrived at the licensed premises on July 13, 1974 at approximately 8:20 p.m. and took up a post of observation in front of the licensed premises. He was specifically interested in making surveillance of the package goods store area, to the front of which is situated a parking lot.

Agent D observed two youthful looking patrons walking in the area and enter the licensed premises through the front door.

The following testimony was elicited of agent D:

> "Q After they entered did you observe anything else?

A We observed them physically inside the premises. After they had a bottle, they picked up a bottle somewhere on one of the shelves. A few people in the store and people walking in front of it. After picking up the bottle he proceeded to the counter, where a couple of clerks were on duty, placed the bottle on the counter, and paid money, money was exchanged between himself and Mr. Ward, later identified as Mr. Ward. The bottle was sloe gin, was placed in a bag, the sale was rung up on a cash register, and the patron departed the store.

Q How did you come to find out the bottle contained sloe gin?

A We could see from where we were at it was a bottle of sloe gin, but the make or anything like that of the sloe gin we couldn't see.

Q What did you do after you observed the minor purchase the bottle?

A He left -- the two of them came out and walked down the street away from the place; so while we were identifying ourselves nobody from the licensee could observe us, agents P and C stopped the patron right around the next corner and learned he was fifteen years of age.

Q What patron was this?

A Mr. [the minor].

Q Were you there at the time?

A I was there. I observed the whole thing with the exception when they stopped him. Then they brought him back. I was still in front of the place. I remained where the car was in front of the premises."

Thereafter, accompanied by James, agent D entered the licensed premises; identified himself to Ward and informed him of what had happened. Ward admitted that he had served James and did not check him out.

The bottle that was seized from James was brought to the local ABC Control room.

On cross examination, agent D asserted that he was standing immediately in front of the window of the liquor store; that he was approximately four feet distant from the counter and was approximately six feet distant from the cash register.

Agent D received the bottle, which he identified as a 4/5 quart of Jacquin Sloe Gin, from agent P. He did not see how agent P obtained possession of the bottle. Agents P and C were around the corner when they accosted the minor.

Agent D tagged the bottle and placed his signature and the case number thereon, on Monday morning July 15, 1974. He had obtained possession of the bottle on the Saturday night previous thereto and placed it in the trunk of his car.

Agent D conceded that he did not ask Ward whether he had served James a bottle of sloe gin; nor did he obtain an admission from him that he sold James an alcoholic beverage. Agent D did ask Ward whether he remembered serving James. Ward responded affirmatively.

On redirect examination, agent D testified, as follows:

"Q You observed him [James---] bring the bottle which we have just identified to the bartender or sales person in the store and you observed him purchase that bottle from Mr. Ward?
A That is correct.
Q When you walked back inside did you ask the sales person whether or not he served Mr. [the minor].
A That is correct.
Q What was his answer?
A At first he said, 'Yes, I remember serving him.' Then later he did not remember. It was part confusion."

ABC agent P, who had accompanied agent D in the subject investigation, testified that he made a surveillance of the package goods store from a point where he could "see into the premises very well." He observed two youthful looking patrons (who had pooled their money prior to entering) enter the liquor store. He saw one of the youths, later identified as James, proceed to the counter with a bottle (which he later identified as the bottle of sloe gin which was eventually turned over to agent D) and place it on the counter. A male behind the counter placed the bottle in a bag and rang up the sale on the cash register from money which he received from James.

James and his companion departed from the premises. Agents P and C followed them around the corner where agent P accosted James and, upon ascertaining that he was a minor, seized the bottle of sloe gin which he had in the bag.

Agent P was eight or nine feet distant from the cash register. He was close enough to observe the item purchased by the minor.

No testimony was presented on behalf of the licensee.

The pivotal issue in this case has been clearly delineated, namely: whether this minor (whose statutory ineligibility to purchase alcoholic beverages has been clearly established) was sold and alcoholic beverage, in violation of the applicable statute and Rules and Regulations of this Division.

In its motion to dismiss the charge and in its memorandum, licensee argues that the Division had not established the guilt of the licensee by a fair preponderance of the credible evidence; that there was no proof that Ward was an employee of the licensee; that Ward was not subpoenaed by the Division; that Ward was found

not guilty of serving a minor in the Municipal Court hearing; and that no positive identification was made of the seller or the purchasers.

We are dealing with a purely disciplinary action; such action is civil in nature, and not criminal. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951). Thus the proof must be supported by a fair preponderance of the credible evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956).

I find that the testimony elicited from agent D hereinabove set forth, in its pertinent part, establishes that the minor was, in fact, the purchaser of the alcoholic beverage and that the seller was Ward. Despite an intensive cross examination, it was also clearly established that the beverage sold to the minor was an alcoholic beverage. Both of the agents, who testified herein, asserted that they observed that the bottle brought to the counter by the minor was sloe gin. This was corroborated by the finding of a bottle of sloe gin in the bag in the possession of the minor after he left the subject facility.

In considering licensee's argument that there was no proof offered that Ward was an employee of the licensee, it is axiomatic that anyone who performs services in furtherance of the licensee's business is considered an employee thereof. It is undisputed that Ward was behind the counter, bagged the bottle brought to the counter by the minor, and received payment therefor. See Murphy's Bar & Lounge, Bulletin 1818, Item 1, and cases cited therein; reversed as to penalty only, Murphy's Bar & Lounge, Inc., (App. Div. 1969), not officially reported, recorded in Bulletin 1846, Item 1. Cf. Kravis v. Hock, 137 N.J.L. 252 (Sup. Ct. 1948).

The fact that Ward was found not guilty of serving a minor in the local municipal proceeding is irrelevant in arriving at an adjudication of the subject charge. This is an action against the license, and not against an individual. Furthermore, the subject action is a civil proceeding and thus the truth of the charge must be established by a fair preponderance of the believable evidence only, and, thus, different from the criminal charge levelled in the Municipal Court against the seller, which was criminal in nature wherein the guilt had to be proven beyond a reasonable doubt. See In re Schneider, supra; Kravis v. Hock, supra; Butler Oak Tavern v. Division of Alcoholic Beverage Control, supra.

Finally, contrary to licensee's assertion it was not incumbent upon the Division to produce Ward as a witness, since the Division proved its charge through the witnesses which it produced. In fact, to the contrary, the licensee should have produced this witness in its defense. The failure to do so, if he was available raises an adverse inference that if produced, he would not be able honestly to refute the testimony of the Division witnesses.

In sum, I find all of licensee's contentions lacking in merit.

Accordingly, upon considering the totality of the record herein, and the various precedents cited, I find that the charge has been sustained by a fair preponderance of the credible evidence, indeed, by substantial evidence. I, therefore, recommend that the licensee be found guilty of the said charge. In view of my finding, I recommend that licensee's motion to dismiss the charge be denied.

Licensee has no prior record of suspension of license. I, further, recommend that the license be suspended for forty-five (45) days.

Conclusions and Order

Written exceptions to the Hearer's report, with supportive argument were filed by the licensee and an answer to the exceptions was filed on behalf of the Division, pursuant to Rule 6 of State Regulation No. 16.

I have fully examined and analyzed the said exceptions, and find that they have either been correctly resolved in the Hearer's report, or are devoid of merit.

Thus, having carefully considered the entire record herein, including the transcripts of testimony, the Hearer's report, the exceptions filed with respect thereto and the answer to the said exceptions, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 27th day of February 1975,

ORDERED that Plenary Retail Consumption License C-4, issued by the Board of Commissioners of the City of Sea Isle City to To-Glo Corporation, t/a La Chateau Lounge & Freda's Package Goods & La Costa Motel, for premises 4000-4012 Landis Avenue, Sea Isle City, be and the same is hereby suspended for forty-five (45) days, commencing at 1:30 a.m. Tuesday, March 11, 1975 and terminating at 1:30 a.m. Friday, April 25, 1975.

Leonard D. Ronco
Director

3. STATE LICENSES - NEW APPLICATIONS FILED.

Hub City Distributors, Inc.
649 Whitehead Road Extension
Trenton, New Jersey

Application filed April 4, 1975 for place-to-place transfer of Additional Warehouse License AW-55 from Trenton Industrial Center, South Clinton Avenue, Trenton, New Jersey, to Ward Avenue, Trenton, New Jersey, operated under Limited Wholesale License WL-75.

Todd E. Seifert
t/a Seifert Distributing Company
11 Avenue E
Lodi, New Jersey

Application filed April 9, 1975 for person-to-person transfer of State Beverage Distributor's License SBD-163 from Otto E. Seifert, t/a Seifert Distributing Company.

Flanders Beer Distributors, Inc.
Gold Mine Road, Lot. 13C, Block 145
Mt. Olive Twp., PO Flanders, New Jersey

Application filed April 11, 1975 for person-to-person and place-to-place transfer of State Beverage Distributor's License SBD-53 from Gerard Calabrese, t/a Haledon Distributing Co., 29 Mangold Street, Rear, Haledon, New Jersey.

C. Schmidt & Sons, Inc. of New Jersey
Interstate Industrial Park
Bellmawr, New Jersey

Application filed April 10, 1975 for place-to-place transfer of Limited Wholesale License WL-11 from 2530 South Broadway, Camden, New Jersey.

Leonard D. Ronco
Director