

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N. J.

NOTICE

On Monday, August 17, 1964, "Centrex" became effective for the Division of Alcoholic Beverage Control. The Division's present exchange number is 648 and in an effort to assist members of the industry when placing telephone calls, I furnish the following direct extension numbers each of which must be preceded with our exchange number 648.

HANRATTY, R. (Sec'y to Director)	3312
TSCHUPP, E. (Legal Deputy Director)	3610
SAUM, H. (Licensing Deputy Director)	3355
STOCKBURGER, H. (Enforcement Deputy Director)	2684

AMADA, E.	2606
AMBROSE, E.	3343
FIGURELLI, D.	2668
GOLD, S.	2175
GOSSWEILER, R.	3365
GROSS, H.	2698
HERR, G.	2194
HURLEY, T.	2689
KREMER, C.	2607
LERNER, J.	2658
MEYER, A.	3342
PILTZER, D.	2647
ZEMEL, M.	2688

For assistance in reaching other staff members, it is suggested that you dial 648-2121.

JOSEPH P. LORDI
DIRECTOR

Dated: August 18, 1964

New Jersey State Library

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N. J.

August 18, 1964

BULLETIN 1575

TABLE OF CONTENTS

ITEM

1. DISCIPLINARY PROCEEDINGS (Newark) - UNLAWFUL STORAGE -
SALE BY RETAILER TO RETAILER - UNLAWFUL TRANSPORTATION -
LICENSE SUSPENDED FOR 30 DAYS, LESS 5 FOR PLEA.
2. DISCIPLINARY PROCEEDINGS (West Orange) - SOLICITOR'S PERMIT -
EMPLOYMENT OF SOLICITOR BY RETAILER - HINDERING INVESTIGATION -
PERMIT SUSPENDED FOR 15 DAYS.
3. DISCIPLINARY PROCEEDINGS (Newark) - UNLAWFUL STORAGE -
PURCHASE BY RETAILER FROM RETAILER - HINDERING IN-
VESTIGATION - LICENSE SUSPENDED FOR 30 DAYS.
4. STATE LICENSES - NEW APPLICATION FILED

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N. J.

August 18, 1964

BULLETIN 1575

1. DISCIPLINARY PROCEEDINGS - UNLAWFUL STORAGE - SALE BY RETAILER
TO RETAILER - UNLAWFUL TRANSPORTATION - LICENSE SUSPENDED FOR
30 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary)
Proceedings against)

FRED FICHTELBERG)
t/a FREDDIE'S LIQUORS)
58 - 17th Avenue)
Newark 3, N. J.)

CONCLUSIONS
AND ORDER

Holder of Plenary Retail Distribution)
License D-161, issued by the Municipal)
Board of Alcoholic Beverage Control of)
the City of Newark.)

Robert W. Wolfe, Esq., Attorney for Licensee.
David S. Piltzer, Esq., Appearing for the Division of Alcoholic
Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to charges as follows:

"1. On November 6, 1963 and divers dates prior thereto, you stored alcoholic beverages other than at your licensed premises or a public warehouse licensed under the Alcoholic Beverage Law, or at other premises pursuant to special permit first obtained from the Director of the Division of Alcoholic Beverage Control, namely, at the premises of Max Newman & Karol N. Gitter, t/a M. Newman Liquors, 401 Clinton Avenue, Newark, N. J.; in violation of Rule 25 of State Regulation No. 20.

"2. On November 1, 1963, you delivered alcoholic beverages to another retailer, namely, the above mentioned Max Newman & Karol N. Gitter; in violation of Rule 15 of State Regulation No. 20.

"3. On November 1, 1963, you transported alcoholic beverages within New Jersey in a vehicle not having a transit insignia affixed thereto or an inscription painted thereon; in violation of Rule 1 of State Regulation No. 17."

Reports of investigation disclose that, allegedly in pursuance of a scheme to defraud an insurance company, the licensee delivered and caused to be delivered a total of 102 cases of alcoholic beverages from his licensed premises to licensed premises of Max Newman and Karol N. Gitter, t/a M. Newman Liquors, 401 Clinton Avenue, Newark, for storage on those premises. See Re Newman & Gitter, Bulletin 1575, Item 3; Re Seizure Case No. 11,155, Bulletin 1576, Item 2. (not yet published).

Absent prior record, the license will be suspended on the first and second charges for twenty days (Re Steinweiss, Bulletin

1401, Item 7) and on the third charge for ten days (Re Tafrow, Bulletin 1243, Item 3), or a total of thirty days, with remission of five days for the plea entered, leaving a net suspension of twenty-five days. Cf. Re Lyle, Bulletin 1352, Item 9.

Accordingly, it is, on this 6th day of July, 1964,

ORDERED that Plenary Retail Distribution License D-161, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Fred Fichtelberg, t/a Freddie's Liquors, for premises 58 - 17th Avenue, Newark, be and the same is hereby suspended for twenty-five (25) days, commencing at 9:00 a.m. Monday, July 13, 1964, and terminating at 9:00 a.m. Friday, August 7, 1964.

JOSEPH P. DORDI
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - SOLICITOR'S PERMIT - EMPLOYMENT OF SOLICITOR BY RETAILER - HINDERING INVESTIGATION - PERMIT SUSPENDED FOR 15 DAYS.

In the Matter of Disciplinary
Proceedings against

ARTHUR GITTER
41 Woodland Avenue
West Orange, N. J.

CONCLUSIONS
AND ORDER

Holder of Solicitor's Permit #3666
for the year 1963-64 and Solicitor's
Permit #3540 for the year 1964-65,
issued by the Director of the Division
of Alcoholic Beverage Control.

Emanuel M. Ehrehkranz, Esq., Attorney for Permittee.
David S. Piltzer, Esq., Appearing for the Division of Alcoholic
Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Permittee pleaded not guilty to the following charges:

"1. On November 7, 1963 and on divers dates prior thereto, you were employed by and connected in a business capacity with a retail licensee, namely, Max Newman & Karol N. Gitter, t/a M. Newman Liquors, 401 Clinton Avenue, Newark, New Jersey; in violation of Rule 7 of State Regulation No. 14.

"2. On or about November 12, 1963, you hindered and delayed and caused the hindrance and delay of an investigation, inspection and examination being conducted by an Investigator of the Division of Alcoholic Beverage Control and you failed to facilitate such investigation, inspection and examination; in violation of R.S. 33:1-35."

Testimony with reference to these charges was heard at a consolidated hearing, which also included disciplinary proceedings

against Max Newman and Karol N. Gitter, t/a M. Newman Liquors, 401 Clinton Avenue, Newark, and a forfeiture proceeding involving property allegedly unlawfully stored on the said premises of Newman and Gitter, which property was owned by Fred Fichtelberg, a licensee with premises at 58 - 17th Avenue, Newark. This report is being submitted simultaneously with Hearer's Reports in the other two cases; a separate report has been prepared in each case in order to delimit the relevant testimony required for an impartial consideration of the proceedings and to protect the rights of the individuals involved.

The following facts were established through the testimony of the Division's witnesses: In pursuance of an investigation into the unlawful warehousing of certain alcoholic beverages belonging to Fred Fichtelberg at the licensed premises of Newman and Gitter, Detective Michael J. Hughes and other Newark police detectives visited the licensed premises at 401 Clinton Avenue, Newark, on November 6, 1963, fortified with a list of liquor invoices addressed to Fred Fichtelberg. Shortly after their arrival, Gitter came into the store and identified himself as the husband of Karol Gitter, co-licensee. He stated that he was in charge of the premises because his wife was sick, and showed them around the premises. After 102 cases of liquor were confiscated by the detectives, a receipt therefor was given to Max Newman, the co-licensee, who arrived during the course of the investigation.

On November 12, 1963, Detectives Hughes and Radice returned to the premises in order to confiscate a case of pints of Calvert Reserve whiskey which had been marked as part of the contraband from Fichtelberg's store. This case had been set aside on November 7, after being initialed by Agent T and Arthur Gitter. Gitter had been informed in the presence of the licensees' two clerks that it was to be isolated and left on the premises in their custody for this Division until the proper invoice could be found identifying the source of the said case. On November 12 the case had disappeared and neither clerk could explain what happened to it. Detective Hughes telephoned Arthur Gitter and he also denied knowing what had happened to the whiskey.

Detective James Radice testified that on his visits to the premises, it was his impression that Arthur Gitter was in charge thereof. He also emphasized that Gitter initialed the particular case of Calvert pints.

ABC Agent T testified that he visited the premises on November 7 and in the company of Arthur Gitter, "who was showing us around the store at the time", inspected the cellar of the premises and more particularly the alcoholic beverages hereinabove referred to. When he found one case of Calvert Reserve pints without a corresponding invoice, he advised Gitter not to touch the case until that invoice could be found. He marked the case "Hold for ABC", initialed it and asked Gitter to initial the case, which he did. Agent T further stated that Gitter spoke to the clerks, Edward Kerstein and Jack Mason, and told them not to touch the case. He was then asked the following:

"Q Who was working on the premises?

A Mr. Kerstein and Mr. Mason were working. Mr. Gitter was on the premises and showed us around and showed us the back room and cellar and gave the general impression of being manager at the time.

Q Who gave orders among the three persons, Mason, Kerstein and Gitter?

A Mr. Gitter advised Kerstein and Mason about not touching the case of Calvert; therefore, he was giving the orders.

Q Did you tell Mr. Gitter anything else concerning this case of Calvert?

A Yes, sir. I advised him prior to leaving if the case of Calvert should disappear before he was notified they would be charged with hindering-- the store itself."

The witness went on to state that on November 15, 1963, he had a discussion with Gitter in front of the Newark Municipal Court after he had learned that this case of Calvert had disappeared, Max Newman, the co-licensee, was present and both denied knowing what happened to the case in question. This witness also prepared a statement at Newark Police Headquarters for Authur Gitter, which was introduced into evidence. In the statement, he was asked:

"Q During the past few weeks had you any affiliations with Newmans Liquors?

A My wife was pregnant and she came into the store once or twice a week during her pregnancy, she was nine months pregnant and two Mondays ago she had the baby and the girl choked during birth and died. Because of this condition I supervised the operation of Newmans Liquors.

Q How long did you supervise the operation of Newmans Liquors?

A My wife worked at the store up until about 2 1/2 months ago and then I took over the supervision of this store.

Q When you indicate that you took over the supervision at this store, will you explain what you mean by supervision?

A The store has two employees during the day and two at night, I told these employees what to order and whom to order from. I also told them when and where to bank. I supervised the men and made sure they did all the cleaning and work. They closed the store at night, I merely made sure that this store was being operated properly."

In further support of his participation as manager of the store, he continued in his statement as follows:

"Q Did you tell either of your employees at Newmans Liquors they could help Freddie move some of the liquor from his store to yours?

A I told Eddie Kerstein."

And:

"Q How much has Freddie Fichtelberg paid you to date for the storage of the liquor in question?

A Not a thing, all a favor, he was a customer and I just wanted to do him a favor. I expected to gain some more business from him for doing him this favor."

Edward Kerstein, testifying on behalf of the Division, stated that he has been employed as a clerk at the premises of Newman and Gitter since several months prior to November 1, 1963. He stated that Arthur Gitter gave him messages, presumably received from his wife, Karol Gitter, and "I did what I was told to" by Mr. Gitter because Mrs. Gitter was sick and unable to supervise the business directly. Pursuant to one of these instructions, he permitted liquor to be stored at Newman Liquors on November 1, which liquor was delivered from the premises of Fred Fichtelberg.

In a statement given to the ABC agent on November 8, 1963, with reference to the capacity of Arthur Gitter at these premises, Kerstein was asked the following:

"Q Who advised you that it would be alright to store this liquor at Newmans Liquors for Freddie's Liquors?

A Artie Gitter.

Q Who is Artie Gitter?

A He is Karol Gitter's husband and he supervises the store.

Q How long has he been supervising the operation of this store?

A For as long as I have been there, I don't know before that.

Q What duties does Arthur Gitter perform at the store, Newmans Liquors?

A He gets change for me and he tells me what to order and that's all.

And further:

"Q Did you know why Mr. Gitter allowed Mr. Fichtelberg to store alcoholic beverages at Newman Liquors?

A Actually at the time I didn't, he just told me to put it there and I did.

Q Do you place all the orders for the liquor for Newman Liquors?

A Yes, Artie Gitter gives them to me and I place them."

Jack Mason, employed as a clerk by Newman and Gitter, testified that Arthur Gitter gave him the orders but he assumed they were being transmitted on behalf of Karol Gitter. However, he admitted that he never heard Mrs. Gitter directly give such instructions to her husband since they were probably given to him at the hospital or at home.

Arthur Gitter, testifying in his own behalf, denied that he was employed in any capacity by Newman and Gitter and insisted that he merely carried out instructions from his wife because she was sick and in the hospital until October 30, 1963. He is employed as a salesman for Galsworthy, Inc. and understands that he is not permitted to participate in the operation of a retail licensed business. He denied that he had any control over any of the employees, nor did he supervise them or have anything to do with the operation of his wife's business. He also maintained that he did not remove the missing case of Calvert whiskey, nor did he have any knowledge of how it had disappeared from the premises.

On cross examination he repudiated the statement given to this Division and insisted that, although he had signed a statement prepared by the ABC agent at police headquarters, he was so distraught by the physical condition of his wife that he does not remember what answers he gave to the questions in that statement. He was then asked:

"Q Did Mr. T ask you the following question: 'During the past few weeks had you any affiliations with Newmans Liquors?'

A I don't recall. Maybe he did.

Q Did you answer the following answer: 'My wife was pregnant and she came into the store once or twice a week during her pregnancy. She was nine months pregnant and two Mondays ago she had the baby and the girl choked during birth and died. Because of this condition I supervised the operation of Newmans Liquors'?

A I might have. But I will tell you the last paragraph I didn't want to put down. I don't even remember anything."

I then asked this witness:

"Q Do you remember saying that?

A I remember nothing, Judge, absolutely nothing.

Q Would you say you did not say that, Mr. Gitter?

A No. I wouldn't say a thing like that. I wouldn't say I didn't."

He was then asked the following questions:

"Q Didn't you tell Agent T, 'The store has two employees during the day and two at night. I told these employees what to order and whom to order from. I also told them when and where to bank. I supervised the men and made sure they did all the cleaning and work. They closed the store at night. I merely made sure that this store was being operated properly'?

A I don't remember any question of that thing. I will tell you the truth. I don't think I could have seen straight the second day."

With respect to the charge of hindering the investigation, the witness was asked the following questions:

"Q Mr. Gitter, do you remember going down to the basement with Agent T and Detective Radice on November 7 in the aftermath of another case of liquor seized from Newman Liquors store?

A I just can't recall. I was so upset after I got out of the station I don't recall nothing, absolutely nothing.

Q You testified on direct examination you recall the agent writing something on a case of liquor.

A I don't recall that. I certainly don't recall that.

Q Do you recall testifying a few moments ago to that effect?

A I will tell you I am so distraught now I don't remember that either.

Q Didn't you further state you are sure you did not sign your name on the case of liquor?

A Yes, I said that. That is right.

Q But only the agent signed his name on that case of liquor?

A I just can't recall."

I than asked:

"Q Nobody is harassing you.

A Nobody is harassing me, not now, definitely not; that is true. All right, I am composed."

He also denied being confronted at the Newark Municipal Court with the discovery that the marked case of Calvert whiskey was missing from the licensed premises. He had no recollection of anything that happened at that time.

Karol Gitter, testifying in support of her husband, insisted that she was in sole charge of the operation of these premises and that her husband took no part in its operation or the supervision of its employees. In fact, her brother, Max Newman, the co-licensee, also had no part in the operation because he had a tavern of his own which took all his time.

This witness stated that she gave express instructions to her husband during the period of her pregnancy and illness with reference to the licensed business; all he had to do was to pick up the checks and take care of certain errands for her at the store. During the time that she was in the hospital, Kerstein was in charge of the business.

Max Newman also testified that Arthur Gitter did not have any supervision or control of the store, to the best of his knowledge, although he admitted that he visited the store infrequently. With reference to a statement prepared by Agent T which he signed on November 18, the following questions were propounded to him:

"Q Didn't he ask you questions about Arthur Gitter supervising the liquor store M. Newman Liquors?

A He may have.

Q The question is, 'Can you definitely swear that Arthur Gitter was not supervising the activities at Newman Liquors?' and the answer, 'I couldn't. I wasn't there.' Is that what you told the agent?

A It would have to be, yes."

I then asked this witness:

"Q You say here in your statement you don't know whether he supervises the store or not to your knowledge. Is that right?

A That is correct.

Q Is that true?

A That is true, yes, sir."

He was further examined with reference to Arthur Gitter's participation in the conspiracy with Fred Fichtelberg to store Fichtelberg's liquor at the premises of Newman Liquors.

"Q Didn't the agent ask you the following questions:
'Have you learned who gave Fichtelberg the permission to put the liquor at Newman Liquors?'
The answer is, 'I've since learned that Artie Gitter let Fichtelberg put the liquor there'.

A Yes, that is true. I learned that thereafter.

Q That is what you told the agent?

A Yes. This was some time afterwards I learned all this."

This witness admitted that in the presence of Arthur Gitter at the Newark Municipal Court he was questioned with reference to the missing case of Calvert whiskey and denied knowing what happened to the whiskey.

With respect to the first charge, I have carefully evaluated and considered all of the testimony and the exhibits. As in all cases of this kind, which are civil in nature, the Division is required to prove these charges by a preponderance of the believable evidence only. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956); Hornauer v. Div. of Alcoholic Beverage Control, 40 N.J. Super. 501 (1956); Atkinson v. Parsekian, 37 N.J. 143 (1962). The general rule in

these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty arising from a fair consideration of the evidence.

I have also had an opportunity to observe the demeanor of the witnesses as they testified at this hearing and to evaluate their testimony upon well-established principles. The testimony, to be believed, must not only proceed from the mouth of a credible witness but must be credible in itself and must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546; Gallo v. Gallo, 66 N.J. Super. 1. The accepted standard of persuasion relating to testimony governing the trier of the facts is that the determination must be founded in truth. Riker v. John Hancock Mutual Life Ins. Co., 129 N.J.L. 508. No testimony need be believed but, rather, so much or so little may be believed as the trier finds reliable. 7 Wigmore Evidence, sec. 2100 (1940); Greenleaf Evidence, sec. 201 (16th Ed. 1899).

Using these principles as a guide, I want to state at the outset that the circumstances in which Arthur Gitter found himself, particularly the illness of his wife, the tragic death of his new-born child and its consequent emotional and psychological impact upon both himself and his wife, have evoked much sympathy from me, as it must have from all who were exposed to this testimony. However, this fact should not becloud a dispassionate consideration of the facts and the evidence as presented in support of these charges. They may and, of course, should be considered in the ultimate penalties, if any are to be imposed.

Gitter, in his defense, recants any admissions made in his signed voluntary statement to the ABC agent, relating to his supervisory duties at the licensed premises. Without blinking at those admissions, I must state with all candor that I was not impressed with Gitter's forthrightness in his testimony before me. The impression that he sought to create was that he was merely a transmission belt from his sick and incapacitated wife.

However, common experience, applicable to the circumstances in this case, would argue forcefully to the contrary. His testimony is contradicted by the testimony adduced by the Division; the clerks admit that he did have supervision and authority in these premises; the ABC agent and police officers came to that conclusion on the basis of his actions within the premises; he admittedly entered into the unlawful conspiracy with Fichtelberg whereby he authorized the storing of Fichtelberg's alcoholic beverages on these licensed premises; he initialed the case of Calvert whiskey on the premises; and the entire atmosphere indicated that, in his wife's absence, he was the de facto manager of her business.

The law is clear that its strict enforcement must depend upon the separation of wholesalers and their solicitors from retailers. I therefore conclude that the Division has established this charge by a fair preponderance of the believable evidence and recommend the finding of guilt on Charge 1.

With respect to the second charge, namely, that of hindering and failing to facilitate the investigation, the wording of the statute is precise and definitive. R.S. 33:1-35 provides in its pertinent part that:

"...every licensee, and every...agent and employee of every licensee, shall, on demand, exhibit to the director...or to his deputies or investigators, or inspectors or agents all of the matters and things which the director...is hereby authorized or empowered to investigate, inspect or examine, and to facilitate, as far as may be in their power so to do, in any such investigation, examination or inspection, and they shall not in any way hinder or delay or cause the hindrance or delay of same, in any manner whatsoever." (Emphasis supplied)

Vogellus v. Div. of Alcoholic Beverage Control, not officially reported, reprinted in Bulletin 1537, Item 1.

Without again detailing the pertinent testimony reflecting upon the validity and proof of Charge 2, it is necessary to point out that Gitter has denied categorically at this hearing that he hindered the investigation or failed to facilitate the same. He had a total lapse of memory concerning the occurrence on November 7 when the case of Calvert whiskey was set aside and charged to the custody of Newman and Gitter. On direct examination, as was indicated above, Arthur Gitter stated that only the ABC agent initialed the case. However, on cross examination, he could not recall who signed the case and, in any event, insisted that he did not sign the case. His testimony is contradicted by police officers and an ABC agent who testified that he and the two clerks were specifically enjoined to hold this case of whiskey in safe-keeping until the proper invoice had been located. I believe their testimony also with respect to the confrontation at the Newark Municipal Court, at which time they informed Gitter, in the presence of Newman, that the case had disappeared and that he was subject to a charge of hindering. It will be recalled that Gitter shrugged his shoulders indifferently.

The testimony is replete with this consistent inability to recall almost anything that happened with respect to these incidents. In the final analysis, it does not make any difference whether the case disappeared due to the negligence or the willfulness of Gitter. The fact is that such activity clearly hinders an investigation and law enforcement agents are not required to submit to such hanky-panky on the part of employees of licensees. I am convinced that the guilt of Arthur Gitter on Charge 2 has been proved by the substantial evidence, and I recommend a finding of guilt thereon.

The permittee has no prior adjudicated record. Under all of the facts and circumstances in this case, I further recommend that his solicitor's permit be suspended on the first charge for five days (Re Bauman, Bulletin 1323, Item 11) and on the second charge for ten days (Re Asselta, Bulletin 1527, Item 4) or a total of fifteen days.

Conclusions and Order

Pursuant to Rule 6 of State Regulation No. 16, written exceptions to the Hearer's Report were filed with me by the attorney for the permittee.

Having carefully considered the entire record herein, including the transcript of the proceedings, the exhibits, memorandum of counsel for the permittee submitted in summation, the Hearer's Report, the exceptions and written argument in substantiation thereof, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 6th day of July, 1964,

ORDERED that Solicitor's Permit No. 3540, issued by the Director of the Division of Alcoholic Beverage Control to Arthur Gitter, 41 Woodland Avenue, West Orange, be and the same is hereby suspended for fifteen (15) days, commencing at 9:00 a.m. Monday, August 3, 1964, and terminating at 9:00 a.m. Tuesday, August 18, 1964.

JOSEPH P. LORDI
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - UNLAWFUL STORAGE - PURCHASE BY RETAILER FROM RETAILER - HINDERING INVESTIGATION - LICENSE SUSPENDED FOR 30 DAYS.

In the Matter of Disciplinary
Proceedings against

MAX NEWMAN & KAROL N. GITTER
t/a M. NEWMAN LIQUORS
401 Clinton Avenue
Newark 3, N. J.

CONCLUSIONS
AND ORDER

Holders of Plenary Retail Distribution
License D-110, issued by the Municipal
Board of Alcoholic Beverage Control of
the City of Newark.

Robert P. Glickman, Esq., Attorney for Licensees.
David S. Piltzer, Esq., Appearing for Division of Alcoholic
Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Licensees pleaded non vult to Charges 1 and 2 and not guilty to Charges 3 and 4, as follows:

- "1. On November 6, 1963 and divers dates prior thereto, you warehoused alcoholic beverages at your above licensed premises without a requisite license, contrary to R.S. 33:1-2; in violation of R.S. 33:1-50(a).
- "2. On November 1, 1963, you obtained alcoholic beverages other than from the holder of a New Jersey manufacturer's or wholesaler's license or pursuant to a special permit obtained from the Director of the Division of Alcoholic Beverage Control, namely, a retail licensee, Fred Fichtelberg, t/a Freddie's Liquors, 58 - 17th Avenue, Newark, N.J.; in violation of Rule 15 of State Regulation No. 20.
- "3. On October 30, 1963, you transported alcoholic beverages within New Jersey in a vehicle not having a transit insignia affixed thereto or an inscription painted thereon; in violation of Rule 1 of State Regulation No. 17.

- "4. On or about November 12, 1963, you hindered and delayed and caused the hindrance and delay of an investigation, inspection and examination being conducted by an Investigator of the Division of Alcoholic Beverage Control and you failed to facilitate such investigation, inspection and examination; in violation of R.S. 33:1-35."

A motion, consented to by the attorney for the licensees, was granted amending the third charge by striking out the words "On October 30, 1963" and substituting therefor "On an occasion during the month of October, 1963."

This matter was presented in a consolidated hearing involving, in addition to these disciplinary charges, a disciplinary proceedings against Arthur Gitter and a forfeiture proceeding. The consolidated hearing was consented to by all counsel representing the parties affected and was conducted as one hearing because the matters are interrelated and the same evidence is applicable to the consideration and disposition of the proceedings. However, I have decided to prepare three separate Hearer's Reports in order effectively to delimit the evidence presented for an impartial consideration thereof and to protect the rights of all the parties.

Before discussing the evidence and the applicable law with reference to Charges 3 and 4, it may be well to set forth a brief summary of the facts in order to furnish a background and perspective with respect to those charges.

The first charge relates to the warehousing of certain alcoholic beverages at the licensed premises without requisite license. The second charge alleges that the licensees obtained alcoholic beverages from a person other than a licensed New Jersey manufacturer or wholesaler or pursuant to special permit obtained from the Director. The genesis of these charges stems from an investigation which disclosed that one Fred Fichtelberg (a licensee) had reported to the Newark Police on November 2, 1963, the theft of a quantity of alcoholic beverages from his licensed premises at 58 - 17th Avenue, Newark. As a result of a complete investigation by local police authorities, State ABC agents and Federal authorities it was developed that Fichtelberg, allegedly in order to perpetrate a fraud upon his insurance carrier, entered into an arrangement with the licensees, their agents, servants or employees, whereby the said licensees agreed to store one hundred two cases of alcoholic beverages at their licensed premises. The substantial portion of these cases was delivered by an agent of Fichtelberg in a motor vehicle owned by Fichtelberg. An additional twenty-seven cases of alcoholic beverages purchased by Fichtelberg from National Wine & Liquor Company (an authorized New Jersey wholesaler) were consigned for delivery to his premises on 17th Avenue. However, when the driver arrived at those premises he was instructed by Fichtelberg's agent to deliver the same to the licensees' premises at 401 Clinton Avenue, Newark.

During the course of their investigation Newark police officers and ABC agents obtained further information upon which the third and fourth charges in these proceedings were preferred.

I

In order to prove the third charge, namely, that the licensees transported alcoholic beverages during the month of October 1963 in a vehicle without transit insignia affixed or inscription painted thereon, the Division called as its witness Detective Michael J. Hughes of the Newark Police Department. He testified that during the course of his investigation and interrogation of witnesses he was informed that, in addition to the one hundred two cases of alcoholic beverages which were stored for Fred Fichtelberg at the licensed premises of the above named licensees, an agent of the said licensees had theretofore transported numerous cases of alcoholic beverages which they had purchased from Fred Fichtelberg. Hughes testified further that he questioned Jack Mason (an employee of the licensees) who admitted in a signed statement that, at the direction of Arthur Gitter, Mason picked up cases of liquor at the premises of Fred Fichtelberg. In this statement, taken by ABC Agent T in the presence of Detective Hughes at Newark police headquarters, Mason said, "I made three trips with the Buick and picked up a total of 25 cases of mixed stuff, V.O., Grand Dad and other full cases. I carried these 25 cases down the dellar at Newman Liquors."

There was also introduced into evidence the signed statement of Arthur Gitter (husband of co-licensee Karol Gitter) taken by ABC Agent T in the presence of Detective Hughes. The statement sets forth the transaction relating to the transportation and storage of the one hundred two cases as hereinabove adverted to. He was then asked the following question with specific reference to Charge 3:

"Q Can you explain the transportation of 8 or 9 cases of liquor for Freddie Fichtelberg in the Buick which belongs to Newman's Liquor Store?

A I sent Jack Mason over to pick up 8 or 9 cases of liquor from Freddie Liquors Store about 2 or 3 weeks ago. This was liquor which Freddie Fichtelberg sold to me because he needed money. I purchased these cases at wholesale price and I placed them in the stock at Newman's Liquor store and sold them to consumers."

It was admitted by the witnesses for the Division that none of the whiskey referred to in Charge 3 was found on the premises at the time of the investigation by ABC agents and Newark police.

The Division called as its witness Jack Mason (the clerk employed by the licensees who allegedly transported these cases of alcoholic beverages in the Buick automobile). Mason categorically denied that he had ever picked up any cases of liquor from Fred Fichtelberg and denied that he had ever transported any alcoholic beverages in that vehicle. He stated that the vehicle was used solely for the purpose of transporting Edward Kerstein (another clerk employed by the licensees) to and from his home; that at no time was the motor vehicle used at the licensed premises to deliver or transport any alcoholic beverages. The witness repudiated the statement given to ABC agents; explained the circumstances under which he executed the same as follows: He does not know how to read or write and can only sign his name. He was taken to police headquarters where a statement was prepared and "something was read to me." He was then asked the following by me:

"Q When you said you may have told the police you used the car to cart liquor back and forth why may you have said that?

A I was just scared. I would say anything.

Q You were going to say anything to get out of it?

A Yes, because I was afraid down there.

Q Were you told the only way you could be turned loose if you said you carted liquor?

A That is right, say anything to get out of it."

The licensees called as their witness in defense of Charge 3 Arthur Gitter (husband of Karol N. Gitter, co-licensee). He gave the following explanation: He was called to police headquarters shortly after the police visited the premises and found the large quantity of alcoholic beverages in the basement of those premises, and was questioned with reference to the transportation of other liquor in the Buick sedan owned by Karol Gitter. He was nervous and upset and in an almost hysterical condition because his wife was confined to Beth Israel Hospital. She had just given birth to a child who died shortly after birth and this had a tremendous effect upon his mental processes. He was asked whether he had given the statement and whether he had read it, and his answer was, "I remember listening to questions and I answered, but I don't remember what I said. When I picked up the paper (the statement) today that was the first I knew what I said on the thing." He stated that, in addition to the great mental and emotional strain under which he operated at that time, the police had threatened to arrest his wife and bring her to police headquarters for questioning. He also stated that they threatened him with revocation of his solicitor's permit (Gitter is a solicitor for a liquor wholesaler).

The witness categorically denied that the Buick motor vehicle owned by his wife was ever used for the transportation of alcoholic beverages on behalf of the licensees and, more specifically, denied that he had ordered Jack Mason to transport alcoholic beverages in the said vehicle. He maintained that Mason did not transport such alcoholic beverages at that time from the licensed premises of Fred Fichtelberg.

Edward Kerstein (employed on the dates in question by the licensees herein) stated that he had no knowledge of any alleged transportation of alcoholic beverages in the Buick automobile. He also maintained that the said Buick was used for the sole purpose of transporting him to and from the place of employment and was not used for the delivery or transportation of alcoholic beverages.

Karol Gitter (the co-licensee) testified that no deliveries are made from her licensed premises and that the Buick which she owns is neither licensed to transport alcoholic beverages nor was it ever used for that purpose.

Before commenting on the testimony with respect to Charge 3, it would be well to dispose of an objection made by counsel for the licensees to the impeachment of the testimony of Mason by the Division's attorney. It will be recalled that Mason signed a statement to the effect that he transported on behalf of the licensees certain alcoholic beverages from the premises of

Fichtelberg to these premises. At the hearing he denied that that was the fact, and the statement was used by the Division's attorney to contradict such testimony. Licensees' counsel advocates that the Division is bound by the testimony of its own witness and that, when a party is surprised by harmful, adverse testimony given by its own witness in conflict with a prior statement, he may attempt to neutralize or discredit this evidence by showing a contradictory statement on a previous occasion. In order to warrant the neutralizing of such testimony counsel maintains that it is essential that three conditions exist: (1) a witness must make an adverse statement contradicting a prior statement made by him; (2) the statement must have been unexpected by the party against whom it is made, i.e., he must be surprised thereby; (3) the statement must be harmful to the party against whom it is made; citing State v. Baechlor, 52 N.J. Super. 378, 145 A. 2d 631.

Counsel further argues that, in order for such neutralization to be warranted, there must be actual surprise, i.e., unexpectedly adverse testimony, citing State v. D'Adame, 84 N.J.L. 386, 86 A. 404; and State v. Caccavale, 58 N.J. Super. 560, 147 A. 2d 21. He points out that the Division's attorney questioned Mason immediately prior to the hearing, learned of the testimony he intended to give, and was therefore not surprised, and hence he claims that the admission of such neutralizing testimony was erroneous.

Counsel for the Division admits that he was aware of Mason's intention to disavow the statement given prior to the hearing, but points out that such indication of intention to disavow was not made under oath. The only testimony under oath was that given at the hearing. The cases cited by licensees' counsel have been expressly superseded by the New Jersey Supreme Court in State v. Guido, 40 N.J. 191 (1963), wherein, at p. 200, it was said:

"...the State should not be compelled to accept an unsworn disavowal, for it may not really know whether the witness will, under oath, maintain the second story."

Since such disavowal was not under oath, but was merely verbal in response to informal questioning prior to the hearing, the Division was not compelled to be "surprised" by his disappointing answers in order for it to neutralize them with his original statement.

Under the circumstances herein, coupled with the fact that Mason could neither read nor write and the particular circumstances under which he signed the statement, I am not inclined to give any weight to the admissions made therein. I am also persuaded that the admissions made by Arthur Gitter in his statement must be weighed by the emotional state in which he found himself at the time that he signed that statement. He, too, has contradicted his prior admissions and has denied that there was any such transportation of alcoholic beverages.

It should be observed that there was no testimony to suggest that Mason acted under the express direction or with the knowledge of the licensees but only of Arthur Gitter who, the Division contends, was the agent of the said licensees. We have no direct evidence supporting Charge 3 other than the statement of Gitter, which would be only corroborative in nature. A serious question arises whether this is adequate on which to

ground the Division's allegation. As the court stated in Mazza v. Cavicchia, 15 N.J. 498, such statement (in that case an affidavit) would be merely corroborative of affirmative evidence already in the record.

My careful evaluation and consideration of all the evidence herein leads me to the conclusion that the Division has failed to prove Charge 3 by a fair preponderance of the believable evidence. Thus I recommend that this charge against licensees be dismissed.

II

In support of the fourth charge, wherein the licensees are alleged to have hindered and delayed and caused the hindrance and delay of an investigation being conducted by this Division and that they failed to facilitate such investigation, the Division produced the following testimony: After Newark police officers uncovered the fact that one hundred two cases of alcoholic beverages had been unlawfully transported to and stored at the licensed premises herein, they visited the said premises on November 6, 1963, and confiscated the said alcoholic beverages. At that time Arthur Gitter (who was on the premises), according to the testimony of ABC Agent T, appeared to be the manager of the premises and accompanied this agent and the police officer in checking the stock on the premises.

Accompanying them also were Kerstein and Mason (the clerks employed in the store). In the cellar they found a case of pints of Calvert Reserve whiskey which appeared to be part of a shipment from Galsworthy, Inc. The agent requested that Gitter produce an invoice for that particular case and he was unable to do so. The agent testified as follows:

"I advised him not to touch the case and told him I wanted to check it out since he could not produce an invoice, feeling it was possibly merchandise which did not belong on his premises. I advised him not to touch the case. I marked the case, 'Hold for ABC.' I initialed it in the right-hand corner and dated it and asked Mr. Gitter if he would initial under mine, and he did."

Gitter then explained to Kerstein and Mason that this case was being held for the ABC and instructed them not to touch it. On November 12 the police officers revisited the premises and found that this case was missing.

On November 15 at the Newark Municipal Court the agent, in the presence of Detective Radice, questioned Gitter about the missing case of alcoholic beverages and asked him whether he knew what happened to it. Gitter informed them that he did not know and "merely shrugged his shoulders when he was advised he would be charged with hindering if he could not produce it." This conversation took place in the presence of the co-licensee (Newman) and Kerstein. It was subsequently disclosed, by tracing the serial number with Galsworthy, that this case of Calvert pints had been invoiced to Fred Fichtelberg and was on the licensed premises in question without any proper permit or authorization.

Arthur Gitter, testifying in behalf of the licensees, stated that he did not know what happened to this case and denied

instructing the clerks with respect thereto. He also denied that he removed the case or that he knows who did.

On cross examination he was asked the following questions:

"Q Mr. Gitter, do you remember going down to the basement with Agent T and Detective Radice on November 7 in the aftermath of another case of liquor seized from Newman Liquors store?

A I just can't recall. I was so upset after I got out of the station I don't recall nothing, absolutely nothing.

Q You testified on direct examination you recall the agent writing something on a case of liquor.

A I don't recall that. I certainly don't recall that.

Q Didn't you further state you are sure you did not sign your name on the case of liquor?

A Yes, I said that. That is right.

Q But only the agent signed his name on that case of liquor?

A I just can't recall.

Q Didn't the agent tell you that the case of Calvert whiskey should not be moved?

A This again I can't recall.

Q Would you say he did not tell you anything to that effect?

A I can truthfully tell you I don't remember one way or the other.

Q Didn't you tell the other two employees, Kerstein and Mason, not to touch that case of liquor?

A No, sir. I never said anything to anybody. I don't remember saying anything. I know I never said anything to Eddie Kerstein or anything about whiskey or anything like that.

Q Why are you so sure?

A Because I didn't tell Eddie about any case of whiskey at any time.

Q I thought you said you don't remember anything that happened.

A This I can remember."

Gitter also denied talking to the Division agent and police officer outside the Newark Municipal Court and could not recall anything about any conversation relating to the missing case.

Jack Mason testified on Charge 4 that he might accidentally have opened one of the cases (presumably the case marked by the agent and initialed by Arthur Gitter).

My evaluation and examination of the testimony and the exhibits herein convince me that the act of causing the marked case of alcoholic beverages to disappear, after the express instruction by the ABC agent that that case of whiskey was to be held in custody for this Division, constitutes hindering of the investigation as contemplated by R.S. 33:1-35. It is no defense that the licensees themselves did not participate in or even instruct their agents, servants or employees to commit the act which is the subject of Charge 4. The fact is that the case was removed or destroyed after it had been separated and initialed. Licensees are held liable for the acts of their agents and employees even if those acts are made contrary to and in violation of their express instructions. Greenbrier Inc. v. Hock, 14 N.J. Super. 39.

I believe the testimony of Detective Hughes and Agent T to the effect that this case was separated, initialed by Arthur Gitter, and that it remained in the custody of the licensees on or about November 7. Arthur Gitter was specifically instructed by the agent to hold that case for this Division and was warned that failure to do so would constitute an act of hindering this investigation. When Gitter was questioned at the Newark Municipal Court, in the presence of Newman (the co-licensee), about the disappearance of this case, his attitude was one of lack of cooperation and indeed indifference although he was then informed that, unless this case was produced, a charge as made herein would be preferred against the licensees.

I am unimpressed with the testimony of Arthur Gitter in this regard. It is, in my opinion, a complete and arrogant evasion for him to repeat that he has no recollection of what occurred; his constant answers of "I don't recall" make no sense and display an absence of candor. At this hearing, many months after the incident, he was not under any particular emotional stress, and I feel that he made no attempt to forthrightly portray the incidents that happened. His answers reflect contradictions and it appeared to me that he remembered only those things that he wanted to remember. Thus, for example, he was certain that he did not instruct Kerstein and Mason not to touch the case of liquor, although he had no memory of any of the other incidents in that experience. Another instance of the contradictory testimony became manifest when he testified on direct examination that, while he personally did not initial this case, he noted that the agent did so initial the same. On cross examination, however, he had a quick return to this testimonial amnesia whenever questions adverted to these incidents.

The testimony reflects a willful and deliberate disregard to the agent's clear instructions and an obvious concealment of the unlawful disposal of the marked case of whiskey. The whiskey was in the custody of the licensees' agents and employees and there is not the slightest suggestion that anyone other than those agents and employees had any access thereto or control thereof. The suggestion that the alcoholic beverages may have been inadvertently sold in the normal course of trade is absurd and must be rejected. In any event, it certainly will be no defense to this charge. It is therefore abundantly clear that the failure to produce the marked case or reveal its destination establishes that the licensees hindered the investigation and did not do everything in their power to facilitate the investigation. R.S. 33:1-35

provides in pertinent part:

"Every...licensee...shall, on demand, exhibit to the director...or to his...deputies or investigators, or inspectors or agents all of the matter and things which the director of the division...is hereby authorized or empowered to investigate, inspect or examine, and to facilitate, as far as may be in their power so to do, in any such investigation, examination or inspection, and they shall not in any way hinder or delay or cause the hindrance or delay of same, in any manner whatsoever...."

Cf. Vogellus v. Div. of Alcoholic Beverage Control (App.Div. 1963), not officially reported, reprinted in Bulletin 1537, Item 1; Re DiBiase, Bulletin 1559, Item 2; Re Betzel, Inc., Bulletin 1350, Item 2.

The withholding or destruction of such vital evidence defeats and frustrates the powers of investigation and enforcement of the Alcoholic Beverage Law, and strikes at the very roots of our enforcement machinery. I am satisfied that Charge 4 has been proved by a fair preponderance of the credible evidence, indeed by substantial evidence. I therefore recommend that the licensees be found guilty on this charge.

Licensees have no prior adjudicated record. I further recommend that an order be entered dismissing the third charge, suspending the license on the first and second charges for twenty days (Re Four Hundred 21st Avenue, Inc., Bulletin 1405, Item 6), and on the fourth charge for ten days (Re Asselta, Bulletin 1527, Item 4), making a total suspension of thirty days, without any remission for the plea entered to the first and second charges in view of the contest of the fourth charge on which there is a recommended finding of guilt. Re Edna W. Fuller Company, Bulletin 1545, Item 3.

Conclusions and Order

Pursuant to Rule 6 of State Regulation No. 16, written exceptions to the Hearer's Report were filed with me by the attorney for the licensees.

Having carefully considered the entire record herein, including the transcript of the proceedings, the exhibits, memorandum of counsel for the licensees submitted in summation, the Hearer's Report, the exceptions and written argument with reference thereto, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

However, with respect to Charge 3, I specifically find that State v. Guido, 40 N.J. 191 (1963), has not changed the principles of law applicable to the doctrine of neutralization as enunciated in State v. Baechlor, 52 N.J. Super. 378 (App. Div. 1958); and State v. Caccavale, 58 N.J. Super. 560 (App. Div. 1959).

In any event, the issue is of no moment in the case sub judice since Mason could neither read nor write and, in view of the particular circumstances under which he signed the statement, I find that the statement was involuntary, inadmissible and could not be used for purposes of neutralization.

Consequently, the Hearer properly refused to give any weight to Mason's statement.

Accordingly, it is, on this 6th day of July, 1964,

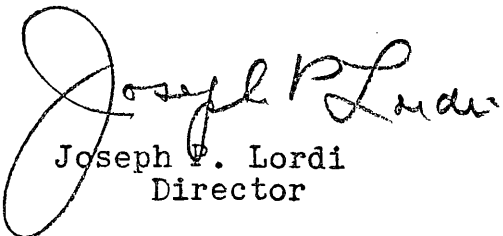
ORDERED that Plenary Retail Distribution License D-110, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Max Newman & Karol N. Gitter, t/a M. Newman Liquors, for premises 401 Clinton Avenue, Newark, be and the same is hereby suspended for thirty (30) days, commencing at 9:00 a.m. Monday, July 13, 1964, and terminating at 9:00 a.m. Wednesday, August 12, 1964.

JOSEPH P. LORDI
DIRECTOR

4. STATE LICENSES - NEW APPLICATION FILED

Gateway Distributors, Inc.
t/a Emery Clinton
1414-32 Chestnut Avenue
Hillside, New Jersey

Application filed August 5, 1964 for transfer of Plenary Wholesale License W-64 from Austin, Nichols & Co., Inc., t/a Johnson & Murray amended August 11, 1964 to include additional warehouse at 416-418 North North Carolina Avenue, Atlantic City, New Jersey


Joseph P. Lordi
Director