

LEGISLATIVE BILL 123

Approved by the Governor May 1, 1991

Introduced by Rogers, 41

AN ACT relating to business relationships; to amend sections 69-1501 and 69-1503, Reissue Revised Statutes of Nebraska, 1943; to adopt the Equipment Business Regulation Act; to harmonize provisions; to provide severability; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 11 of this act shall be known and may be cited as the Equipment Business Regulation Act.

Sec. 2. The Legislature finds that the retail distribution and sales of agricultural and industrial equipment utilizing independent retail businesses operating under agreements with manufacturers, wholesalers, and distributors of such equipment vitally affect the general economy, public interests, and public welfare of the state and that it is necessary to regulate the business relationships between the independent dealers and the equipment manufacturers, wholesalers, and distributors.

Sec. 3. For purposes of the Equipment Business Regulation Act:

(1) Continuing commercial relationship shall mean a relationship in which a dealer has been granted the right to sell and service equipment manufactured by a supplier;

(2) Controlling interest shall mean a combination of ownership or management interests which legally or in practical effect has the power to determine the policies under which a dealership is operated;

(3) Dealer or dealership shall mean an individual, partnership, corporation, association, or other form of business enterprise primarily engaged in the retail sale and service of equipment in this state pursuant to any oral or written agreement for a definite or indefinite period of time in which there is a continuing commercial relationship in the marketing of equipment and related services;

(4) Dealer agreement shall mean a contract or

agreement, whether oral or written, between a supplier and dealer by which the dealer is granted the right to sell, distribute, and service the supplier's equipment and by which there is a continuing commercial relationship between the supplier and the dealer;

(5) Equipment shall mean any machine designed for or adapted and used for agricultural, horticultural, livestock, grazing, forestry, or industrial purposes; and

(6) Supplier shall mean the manufacturer, wholesaler, or distributor of the equipment to be sold by a dealer.

Sec. 4. It shall be a violation of the Equipment Business Regulation Act for a supplier:

(1) To require a dealer to accept delivery of equipment, repair parts, or attachments that the dealer has not voluntarily ordered;

(2) To require a dealer to order or accept delivery of equipment with special features or attachments not included in the base list price of such equipment as publicly advertised by the supplier;

(3) To require a dealer to enter into any agreement, whether written or oral, amendatory or supplementary to an existing dealer agreement with the supplier unless such amendatory or supplementary agreement is imposed on similarly situated dealers;

(4) To take action terminating, canceling, failing to renew, or substantially changing the competitive circumstances intended by the dealer agreement due to the results of conditions beyond the dealer's control, including drought, flood, labor disputes, or economic recession. This subdivision shall not apply if the dealer is in default of a security agreement in effect with the supplier; and

(5) To condition the renewal or extension of a dealer agreement on (a) the dealer's substantial renovation of its place of business or the construction, purchase, acquisition, or rental of a new place of business by the dealer unless the supplier advises the dealer in writing of its demand for such renovation, construction, purchase, acquisition, or rental within a reasonable time prior to the effective date of the proposed renewal or extension, but in no case less than one year prior to such date, or (b) capital construction exceeding the terms of the dealer agreement in force and effect on the effective date of this act.

Sec. 5. (1) A supplier shall be deemed to have good cause to terminate, cancel, or not renew a dealer agreement when a dealer:

(a) Has transferred a controlling interest in the dealership without the supplier's consent;

(b) Has made a material misrepresentation to the supplier;

(c) Has filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed against it which has not been discharged within sixty days after the filing, is in default under a security agreement in effect with the supplier, or is insolvent or in receivership;

(d) Has been convicted of a crime punishable by a term of imprisonment for one year or more;

(e) Has failed to operate in the normal course of business for seven consecutive business days or has terminated business;

(f) Has relocated its place of business without the supplier's consent;

(g) Has consistently engaged in business practices which are detrimental to the consumer or supplier by way of excessive pricing, misleading advertising, or failure to provide service and replacement parts or perform warranty obligations;

(h) Has inadequately represented the supplier over a measured period causing lack of performance in sales or service or warranty areas and has failed to achieve market penetration at levels consistent with similarly situated dealerships based on available record information;

(i) Has consistently failed to meet building and housekeeping requirements or has failed to provide adequate sales, service, or parts personnel commensurate with the dealer agreement;

(j) Has consistently failed to comply with the applicable licensing laws pertaining to the products and services being represented for the supplier and on the supplier's behalf; or

(k) Has consistently failed to substantially comply with essential and reasonable requirements imposed by the dealer agreement, but only if that requirement is also generally imposed upon similarly situated dealers in Nebraska.

(2) Except when good cause exists as provided in subdivisions (1)(a) through (f) of this section, a supplier shall give a dealer ninety days' written notice of the supplier's intent to terminate, cancel, or not renew a dealer agreement. The notice shall state all reasons constituting good cause for termination, cancellation, or nonrenewal and shall provide that the dealer has sixty days from receipt of the notice in

which to cure any claimed deficiency, except that the dealer shall have one year from receipt of the notice to cure a deficiency described in subdivision (1)(h) of this section.

Sec. 6. (1) A supplier shall provide for the availability of repair parts throughout the reasonable useful life of any equipment sold.

(2) A supplier shall at least annually provide dealers an opportunity to return surplus repair parts for credit without restrictions as follows:

(a)(i) The supplier may notify the dealers of a surplus parts return program for a time period of at least sixty days in duration during which dealers may submit a list of their surplus parts and return the parts to the supplier; or

(ii) If twelve months have elapsed and the supplier has not notified a dealer of a surplus parts return program, the dealer may submit to the supplier a request to return surplus parts and the supplier shall allow the dealer to return the parts within thirty days after receipt of the request;

(b) Subject to the other provisions of this section, a supplier shall allow a dealer to return parts with a dollar value equal to at least six percent of the total dollar value of parts purchased by the dealer from the supplier or the supplier's predecessor in interest during the twelve-month period immediately preceding either the notification to the dealer of the supplier's surplus parts return program or the month the dealer's return request is made, whichever is applicable. A dealer may elect to return a dollar value of parts equal to less than six percent of such total dollar value of parts purchased;

(c) An obsolete or superseded part may not be returned, except that any part listed in the supplier's current list of returnable parts and any superseded part that has not been the subject of a surplus parts return program as of the date of notification to the dealer by the supplier of the current surplus parts return program or the date of the dealer's request to return surplus parts, whichever is applicable, shall be eligible for return;

(d) To be eligible for return, parts must be in new and unused condition and must have been purchased by the dealer from the supplier to whom they are returned or the supplier's predecessor in interest;

(e) The supplier shall allow credit for a returned part of at least eighty-five percent of the current price of the part as listed in the supplier's

effective price list or catalog at the date of the notification to the dealer by the supplier of the surplus parts return program or the date of the dealer's request to return surplus parts, whichever is applicable, or, if there is no effective price list or catalog, in the supplier's invoices;

(f) The supplier shall issue credit to the dealer within ninety days after receipt of the parts returned by the dealer;

(g) The dealer shall be presumed to have purchased the returned parts from the supplier or the supplier's predecessor in interest, and the burden shall be on the supplier to prove otherwise;

(h) The provisions of this section shall be supplemental to any agreement between the dealer and the supplier covering the return of parts which provides the dealer with greater protection;

(i) Nothing in this section shall be construed to affect the existence or enforcement of a security interest which any person may have in the parts of the dealer; and

(j) Nothing in this section shall preclude a credit for returned parts which is greater than the total amount authorized by this section.

(3) The annual parts return provided for in subsection (2) of this section may be waived by a dealer. If a majority of dealers from a single supplier choose to waive the provisions of such subsection, the supplier shall be exempt from such subsection.

Sec. 7. (1) Whenever any dealer enters into a dealer agreement with a supplier in which the dealer agrees to maintain an inventory of equipment, attachments, or repair parts and the dealer agreement is subsequently terminated, the supplier shall:

(a) Repurchase the inventory by:

(i) Paying one hundred percent of the net cost of all new, undamaged, and complete equipment which was purchased from the supplier no more than twenty-four months prior to the date of termination and which is resalable;

(ii) Paying eighty-five percent of the current price of all new, unused, and undamaged attachments and repair parts, including superseded repair parts, which are listed in the price lists or catalogs in use by the supplier on the date of termination; and

(iii) Either (A) paying five percent of the current price on all new, unused, and undamaged attachments and repair parts returned to cover the cost of handling, packing, and loading the attachments and

repair parts or (B) performing the handling, packing, and loading; and

(b) Repurchase at fair market value specialized repair tools purchased by the dealer pursuant to requirements of the supplier from the supplier or an approved vendor of the supplier within three years prior to the date of termination and held by the dealer on the date of termination.

(2) For purposes of this section:

(a) Current price shall mean the price for the attachments, repair parts, or tools listed in the supplier's effective price list or catalog or, if there is no effective price list or catalog, in the supplier's invoices; and

(b) Net cost shall mean the price the dealer paid to the supplier for the equipment less all discounts previously allowed by the supplier to the dealer.

(3) Upon payment of the repurchase amount to the dealer, the title and right to possession of the inventory or tools shall transfer to the supplier. Notwithstanding the requirements of section 9-302, Uniform Commercial Code, on filing notice of a security interest, the dealer shall have a continuing security interest in the inventory or tools until payment by the supplier and shall be treated the same as if the dealer still had possession of the inventory or tools.

(4) This section shall not require the supplier to repurchase from the dealer:

(a) Any repair part or attachment which has a limited storage life or is otherwise subject to deterioration;

(b) Any repair part or attachment which is priced as a set of two or more items if the set is incomplete;

(c) Any repair part or attachment which because of its condition is not resalable as a new part or attachment without repairing or reconditioning;

(d) Any repair part or attachment which is not in new, unused, and undamaged condition;

(e) Any equipment which is not in new, unused, undamaged, and complete condition;

(f) Any inventory for which the dealer is unable to furnish evidence, reasonably satisfactory to the supplier, of good title free and clear of all claims, liens, and encumbrances;

(g) Any inventory which was ordered by the dealer on or after the date of receipt of the notification of termination of the dealer agreement; or

(h) Any inventory which was acquired by the dealer from any source other than the supplier or the supplier's predecessor in interest.

(5) If any supplier fails or refuses to repurchase any inventory or specialized repair tools subject to this section within ninety days after the date the supplier takes possession, the supplier shall be civilly liable for (a) one hundred percent of the net cost of the equipment and of the current price of the attachments, repair parts, and tools, (b) any freight charges paid by the dealer, and (c) all costs of financing such repurchase, including court costs and reasonable attorney's fees.

(6) Nothing in this section shall be construed to affect the existence or enforcement of a security interest which any person may have in the inventory or tools of the dealer.

Sec. 8. (1) In the event of the death or incapacity of a dealer or the majority stockholder of a corporation operating as a dealer, the supplier shall, at the option of the heirs at law if the dealer or majority stockholder died intestate or the personal representative under the terms of the deceased dealer's or majority stockholder's last will and testament if the dealer or majority stockholder died testate, repurchase the inventory and specialized repair tools from the estate as provided in section 7 of this act as if the supplier had terminated the dealer agreement. The heirs or personal representative shall have twelve months from the date of the death of the dealer or majority stockholder to exercise the option. Nothing in this section shall require the repurchase if the heirs or personal representative and the supplier enter into a new dealer agreement. Nothing in this section shall prevent the application of any provisions of the dealer agreement pertaining to death of the dealer or succession to the extent such provisions are not inconsistent with this section. Nothing in this section shall entitle an heir, devisee, or personal representative of a deceased dealer or majority stockholder to continue to operate the dealership without the consent of the supplier.

(2) This section shall be supplemental to any provisions of the dealer agreement covering the return of inventory or specialized repair tools which provide the dealer with greater protection. The heirs or personal representative may pursue either the contract remedy or the remedy provided in this section, and an election to pursue the contract remedy shall not bar

pursuit of the remedy provided in this section as to inventory or tools not affected by the contract remedy. Nothing in this section shall preclude a price for the inventory or tools which is greater than the total provided for in section 7 of this act.

Sec. 9. (1) A term of a dealer agreement which is inconsistent with the terms of the Equipment Business Regulation Act shall be void and unenforceable and shall not waive any rights which are provided to a person by the act.

(2) A dealer may bring an action against a supplier in any court of competent jurisdiction for damages sustained by the dealer as a consequence of the supplier's violation of the act together with the actual costs of the action, including reasonable attorney's fees. The dealer may also be granted injunctive relief against unlawful termination, cancellation, nonrenewal, or change in competitive circumstances. The remedies authorized by this section shall not be exclusive and shall be in addition to any other remedies provided by law.

Sec. 10. The obligations of any supplier pursuant to the Equipment Business Regulation Act shall apply to any successor in interest of a supplier, including any purchaser of assets or stock, any surviving corporation resulting from merger, liquidation, or reorganization, any assignee, any receiver, or any trustee of the original supplier.

Sec. 11. The Equipment Business Regulation Act shall apply to all dealer agreements in effect on the effective date of this act which have no expiration date and are continuing agreements and to all dealer agreements entered into or renewed on or after the effective date of this act. Any dealer agreement in effect on the effective date of this act which will terminate on a subsequent date shall be governed by the law as it existed prior to the effective date of this act.

Sec. 12. That section 69-1501, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

69-1501. Whenever any person, firm, or corporation engaged in the business of selling and retailing farm implements and repair parts for farm implements enters into a written contract evidenced by a franchised agreement whereby such retailer agrees to maintain a stock of parts or complete or whole machines or attachments with any wholesaler, manufacturer, or distributor of farm implements or machinery or repair

parts therefor and either such wholesaler, manufacturer, or distributor or the retailer desires to cancel or discontinue the contract, such wholesaler, manufacturer, or distributor shall pay to such retailer, unless the retailer ~~should desire~~ desires to keep such merchandise, a sum equal to one hundred percent of the net cost of all new unused complete farm implements, machinery, and attachments, including transportation charges which have been paid by such retailer, and eighty-five percent of the current net prices on repair parts, including superseded parts, listed in a current price list or catalog which parts had previously been purchased from such wholesaler, manufacturer, or distributor and held by such retailer on the date of the cancellation or discontinuance of such contract. Such sums shall be due within sixty days of receipt of such farm implements, machinery, or attachments or repair parts therefor by such wholesaler, manufacturer, or distributor from such retailer. An interest rate of fourteen percent per annum shall be assessed on such sums which are delinquent. The wholesaler, manufacturer, or distributor shall also pay such retailer a sum equal to five percent of the current net price of all parts returned for the handling, packing, and loading of such parts for return to the wholesaler, manufacturer, or distributor. Upon the payment of the sum equal to one hundred percent of the net cost of such farm implements, machinery, and attachments, plus transportation charges, and eighty-five percent of the current net prices on repair parts, plus five percent handling, packing, and loading costs on repair parts only, plus freight charges which have been paid by the retailer, the title to such farm implements, farm machinery, and repair parts, or parts therefor, shall pass to the manufacturer, wholesaler, or distributor making such payment, and such manufacturer, wholesaler, or distributor shall be entitled to the possession of such farm implements or repair parts therefor.

The provisions of this section relating to a retailer's right to cancel or discontinue a contract and receive payment for machines, attachments, and parts returned shall apply to all contracts ~~now in effect which have no expiration date and are a continuing contract and all other contracts~~ entered into or renewed after July 1, 1971, but before the effective date of this act, which have expiration dates, except that the provisions for a retailer to receive payment for machines, attachments, and parts returned shall apply only to machines, attachments, and parts purchased after

August 27, 1971. Any contract in force and effect on July 1, 1971, which by its own terms will terminate on a date subsequent thereto shall be governed by the law as it existed prior to August 27, 1971. Sections 69-1501 to 69-1504 shall not apply to any contract to which the Equipment Business Regulation Act applies.

Sec. 13. That section 69-1503, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

69-1503. In the event that any manufacturer, wholesaler, or distributor of farm machinery, farm implements, and repair parts for farm machinery, and farm implements, or of repair parts therefor, upon cancellation of a contract by either a retailer or a manufacturer, wholesaler, or distributor, fails or refuses to make payment to such dealer as required by section 69-1501, or refuses to supply farm machinery, farm implements, and repair parts for farm machinery and farm implements, or repair parts therefor, to any retailer of such products, who may have a retail sales contract with such manufacturer, wholesaler, or distributor dated after July 1, 1971, but before the effective date of this act, which has an expiration date, or a contract with no expiration date or a continuing contract in force or effect on August 27, 1971, with such manufacturer, wholesaler, or distributor, such manufacturer, wholesaler, or distributor shall be liable in a civil action to be brought by such retailer for one hundred percent of the net cost of such farm implements, machinery, and attachments, plus transportation charges which have been paid by the retailer and eighty-five percent of the current net price of repair parts, plus five percent for handling, packing, and loading plus freight charges which have been paid by the retailer.

Sec. 14. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.

Sec. 15. That original sections 69-1501 and 69-1503, Reissue Revised Statutes of Nebraska, 1943, are repealed.

Sec. 16. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.