



## DECISION COVER SHEET

ACTION BY: Public Members Only

ACTION BY: All Members

To : BOARD MEMBERS

Date: November 23, 2021

From : ADMINISTRATIVE LAW JUDGE: Anthony M. Skrocki

CASE: WESTERN TRUCK PARTS & EQUIPMENT COMPANY LLC DBA WESTERN TRUCK CENTER, a California limited liability company v. VOLVO TRUCKS NORTH AMERICA, a division of VOLVO GROUP NORTH AMERICA, LLC, a Delaware limited liability company  
Protest No. PR-2740-21

TYPE: Vehicle Code section 3060 Modification

### PROCEDURAL SUMMARY:

- FILED ON CALENDAR: May 19, 2021
- MOTIONS FILED: Respondent's Motion to Dismiss
- COUNSEL FOR PROTESTANTS: Victor P. Danhi, Esq.  
Franjo M. Dolenac, Esq.  
Arent Fox LLP
- COUNSEL FOR RESPONDENT: Billy M. Donley, Esq.  
Marcus McCutcheon, Esq.  
Baker & Hostetler LLP

### EFFECT OF PROPOSED ORDER:

The Proposed Order grants Respondent's Motion to Dismiss. The protest filed by Western Truck was untimely. Western Truck admits it received the modification notice on November 25, 2020. The 30-day time to file the protest expired on December 28, 2020. Volvo Trucks did not provide an "appeal procedure" within the meaning of Section 3060(b)(1). As the protest was not filed until May 19, 2021, the protest is untimely and must be dismissed with prejudice.

### SUMMARY OF PROPOSED ORDER:

- By letter dated June 15, 2020, Volvo Trucks North America, a division of Volvo Group North

America, LLC (“Volvo Trucks” or Respondent) sent a notice of franchise modification to Western Truck Parts & Equipment Company LLC dba Western Truck Center (“Western Truck” or Protestant). The notice was sent Certified Mail, Return Receipt Requested. The Board received the notice on June 25, 2020. The date Protestant received the notice is in dispute and the subject of this motion to dismiss. Also, in dispute is whether the Alternative Dispute Resolution provision in the franchise is an “appeal procedure provided by the franchisor.”

- The date that Western Truck received the notice is critical because, although the notice of modification was sent on June 15, 2020, Western Truck’s modification protest was not filed until May 19, 2021, 11 months later.
- Vehicle Code<sup>1</sup> section 3060(b) provides alternative time periods for the filing of a timely protest. The first is within 30 days from the time the notice of modification is received, and the alternative is within 30 days after the end of any appeal procedure provided by the franchisor.
- As to the first alternative (filing a protest within 30 days of receipt of the notice), there are two claimed dates for receipt of the notice of modification.
  - First, Volvo Trucks claims the notice was received by Western Truck on June 17, 2020. If this is so, Western Truck would have had until July 17, 2020 to file a timely protest. The protest was filed on May 19, 2021. If there is no alternative time period allowed, the protest is untimely and the Board is without jurisdiction to consider the matter. Respondent was not able to establish that Protestant “received” the notice of modification on June 17, 2020. There was not a return receipt signed by an agent in behalf of Western Truck. The USPS carrier did not comply with its requirement for return receipts for certified mail that were established due to COVID-19. Because neither of these events occurred, the presumption of receipt by Western Truck of the notice of modification on June 17, 2020, did not arise.
  - The second claimed date of receipt of the notice is November 25, 2020, as admitted by Protestant. Section 3060(b) would allow Western Truck 30 days from that date to file a timely protest (until December 28, 2020). If the notice of modification was first received by Western Truck on November 25, 2020 and if there is no alternative time period allowed, the protest filed almost 6 months later on May 19, 2021, is untimely and the Board is without jurisdiction to consider the matter.
- Western Truck claims that its protest is timely as, when it received the notice on November 25, 2020, it initiated what it calls Volvo’s appeal procedure and filed its protest within 30 days after the parties reached an impasse. For this alternative to be available there would

---

1

have to be an “appeal procedure” and it would have to have been “provided by the franchisor.”

- The Alternative Dispute Resolution (“ADR”) procedure contained in the September 1, 2015 franchise is not an “appeal procedure” provided by the franchisor and cannot be used by Western Truck to support its claim that its protest was timely. It is not a “procedure provided by the franchisor” as it relies upon a third-party, a mediator or arbitrator provided by the American Arbitration Association. Even if the ADR provisions were an appeal procedure, Western Truck did not comply with its terms. Western Truck did not pursue the ADR in accordance with its terms nor to an “end” as required by the ADR procedure. Therefore, the time to file a protest was not extended by the alternative language of Section 3060(b) which permits a protest to be filed within 30 days after the “end of any appeal procedure provided by the franchisor.”
- In this case, the only time limit applicable to the filing of a protest is that stated in Section 3060(b) that the franchisee may file a protest with the Board within 30 days after receiving a notice of the proposed modification. As Western Truck admits that it received the notice on November 25, 2020, this time expired December 28, 2020.

#### **RELATED MATTERS:**

- Related Case Law: None.
- Applicable Statutes and Regulations: Code of Civil Procedure section 1020; Government Code section 11515; Uniform Commercial Code section 1202; and Vehicle Code sections 331, 331.1, 331.2, 3050, 3060.

1 NEW MOTOR VEHICLE BOARD  
2 P.O. Box 188680  
3 Sacramento, California 95818-8680  
4 Telephone: (916) 445-1888

**CERTIFIED MAIL**

5  
6  
7  
8 STATE OF CALIFORNIA  
9 NEW MOTOR VEHICLE BOARD

10  
11 In the Matter of the Protest of

12 WESTERN TRUCK PARTS & EQUIPMENT  
13 COMPANY LLC DBA WESTERN TRUCK  
14 CENTER, a California limited liability company,

15 Protestant,

16 v.

17 VOLVO TRUCKS NORTH AMERICA, a  
18 division of VOLVO GROUP NORTH  
19 AMERICA, LLC, a Delaware limited liability  
20 company,

21 Respondent.

**Protest No. PR-2740-21**

**PROPOSED ORDER GRANTING  
RESPONDENT'S MOTION TO  
DISMISS**

22 To: Victor P. Danhi, Esq.  
23 Franjo M. Dolenac, Esq.  
24 Attorneys for Protestant  
25 ARENT FOX LLP  
26 55 Second Street, 21<sup>st</sup> Floor  
27 San Francisco, California 94105

28 Marcus McCutcheon, Esq.  
Attorney for Respondent  
BAKER & HOSTETLER LLP  
600 Anton Boulevard, Suite 900  
Costa Mesa, California 92626-7221

Billy M. Donley, Esq.  
Attorney for Respondent  
BAKER & HOSTETLER LLP  
811 Main Street, Suite 1100  
Houston, Texas 77002-6111

1 This matter came on regularly for telephonic hearing on Thursday, August 26, 2021, before  
2 Anthony M. Skrocki, Administrative Law Judge (“ALJ”) for the New Motor Vehicle Board (“Board”).  
3 Victor P. Danhi, Esq. and Franjo M. Dolenac, Esq. of Arent Fox LLP represented Protestant. Billy M.  
4 Donley, Esq. of Baker & Hostetler LLP represented Respondent. David Winner, Vice President, Dealer  
5 Network Strategy, Volvo Trucks, was also present. After consideration of the pleadings of the parties,  
6 and arguments of counsel regarding the several issues raised, it was determined, with concurrence of  
7 counsel for both parties, that it would be more efficient to first address and resolve the issue of whether  
8 the protest was timely filed. If the protest was not timely filed, the Board would have no jurisdiction to  
9 consider the protest.

10 Subsequent to the telephonic hearing of August 26, 2021, counsel for Respondent requested  
11 permission to file additional pleadings addressing the effect of a change in the U.S. Postal Service  
12 procedures due to the COVID-19 pandemic regarding delivery of certified mail for which a return  
13 receipt was requested. A telephonic conference was held on September 24, 2021, with ALJ Skrocki  
14 presiding. Participating were Victor Danhi, Esq. and Franjo Dolenac, Esq. representing Protestant, and  
15 Billy Donley, Esq. representing Respondent. As this newly discovered information related directly to the  
16 issue of the timeliness of the protest and thus the jurisdiction of the Board, counsel were permitted to file  
17 supplemental briefs. In accordance with an agreed-upon schedule, Respondent filed its Supplemental  
18 Reply to Protestant’s Opposition to Respondent’s Motion to Dismiss on October 4, 2021. Protestant filed  
19 its Response to Respondent’s Supplemental Brief on October 20, 2021.<sup>1</sup>

20 ///

21 ///

---

23 <sup>1</sup> With Protestant’s supplemental brief, it filed a request for judicial notice of “[r]elevant portions of the United  
24 States Postal Service Coronavirus Update for Business Customers, Article No. 4193, dated July 20, 2021,  
25 <https://faq.usps.com/s/article/USPSCoronavirus-Updates-for-Business-Customers> (last visited Oct. 19, 2021).”  
26 Government Code section 11515 provides for “official notice” not “judicial notice.” “In reaching a decision  
27 official notice may be taken, either before or after submission of the case for decision, of any generally accepted  
28 technical or scientific matter within the agency’s special field, and of any fact which may be judicially noticed by  
the courts of this State....” Respondent did not oppose the request for judicial notice and indicated via email that  
Respondent has “no issue with the Judge taking judicial notice of the postal document.” Because the document is  
an official act of the United States Postal Service and meets the standard set forth in the Government Code,  
official notice will be taken.

1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 **The Parties**

3 1. Western Truck Parts & Equipment Company LLC dba Western Truck Center, a  
4 California Limited Liability Company (“Western Truck” or Protestant) is a “franchisee” within the  
5 definition of Vehicle Code section 331.1<sup>2</sup> and Volvo Trucks North America, a division of Volvo Group  
6 North America, LLC, a Delaware Limited Liability Company (“Volvo Trucks” or Respondent) is a  
7 “franchisor” within the definition of Section 331.2.

8 2. “Protestant is a multi-brand dealer authorized to sell Volvo, Mack, Autocar, Hino, Crane  
9 Carrier, and Peterbilt brand trucks and parts. Except for Peterbilt, Protestant operates the other five  
10 franchises from its main dealership located at 1925 Enterprise Boulevard, West Sacramento, CA 95691  
11 (‘Sacramento Dealership’) and another dealership located at 3333 S 99 W. Frontage Road, Stockton, CA  
12 92515 (‘Stockton Dealership’). Protestant also operates the Volvo and Mack franchises from an  
13 additional dealership located at 1800 Twin View Blvd., Redding, CA 96003....” Before acquiring the  
14 Volvo franchise, Protestant was an Autocar, Hino, Crane Carrier, and Peterbilt franchisee and operated  
15 all except Peterbilt from both the Sacramento Dealership and Stockton Dealership. (Protestant’s  
16 Opposition, p. 5, lines 1-10)

17 3. Volvo Trucks is a licensed vehicle manufacturer of Class 8 heavy-duty trucks and is  
18 located at 7900 National Service Road, Greensboro, North Carolina. (Respondent’s Motion to Dismiss,  
19 p. 2, line 2; Modification Notice)

20 **Modification Notice**

21 4. By letter dated June 15, 2020, Volvo Trucks sent a notice of franchise modification via  
22 Certified Mail, Return Receipt Requested, to “Jon Warren, Western Truck Parts & Equipment Company  
23 LLC, 1925 Enterprise Blvd [sic], West Sacramento, CA 95691-3426.” The Board received the notice on  
24 June 25, 2020. The date Protestant received the notice is in dispute and will be discussed *infra*.

25 5. No claim is made that the modification notice did not comply with the “NOTICE TO  
26 DEALER” form or language requirements of Section 3060(b)(2). The notice included the following:

27 \_\_\_\_\_

28 <sup>2</sup> All statutory references are to the California Vehicle Code unless otherwise indicated.

1 **NOTICE TO DEALER: Your franchise agreement is being modified or replaced. If the**  
2 **modification or replacement will substantially affect your sales or service obligations or**  
3 **investment, you have the right to file a protest with the NEW MOTOR VEHICLE**  
4 **BOARD in Sacramento and have a hearing in which you may protest the proposed**  
5 **modification or replacement of your franchise under provisions of the California Vehicle**  
6 **Code. You must file your protest with the board within 30 calendar days of your receipt**  
7 **of this notice or within 30 days after the end of any appeal procedure provided by the**  
8 **franchisor or your protest rights will be waived.**

9 In addition, the text of the Notice contained the following:

10 Your dealership (“Dealer”) is a party with Volvo Trucks North America, a division of Volvo  
11 Group North America, LLC (“Volvo Trucks”) to a Volvo Trucks Dealer Sales and Service  
12 Agreement (“Current Agreement”). Due to changes in business practices at Volvo Trucks and the  
13 industry in general, the Current Agreement no longer adequately reflects our day-to-day business  
14 relationship or practices. It is important to both our dealers and Volvo Trucks that the Current  
15 Agreement is brought up to date in both form and substance to reflect our current relationship.  
16 Accordingly, Volvo Trucks hereby notifies Dealer of its intention to replace Dealer's Current  
17 Agreement with a modified Dealer Sales and Service Agreement (“Modified Agreement”). Note  
18 that the Modified Agreement has been reviewed by the Volvo Dealer Council and is being  
19 presented to all Volvo Trucks dealers in the State of California as well as nationwide.

20 Enclosed is a copy of the Modified Agreement for your review and execution. Volvo Trucks does  
21 not believe that any modifications in the Modified Agreement will substantially affect your sales  
22 or service obligations or investment.<sup>3</sup> The intended effective date of the Modified Agreement will  
23 be September 1, 2020, although in no event will the effective date of the Modified Agreement be  
24 less than 60 days from your receipt of this notice and receipt of this notice by the California New  
25 Motor Vehicle Board. Please sign the enclosed (2) copies of the Modified Agreement and return  
26 it to Volvo Trucks. Volvo Trucks will counter-sign the Modified Agreement and return to you a  
27 fully executed copy. You will also need to complete the *Statement of Ownership* electronically,  
28 print and provide a *Certificate of Good Standing* from the state. Documents should be returned  
no later than **August 31, 2020**. (Emphasis in original.)

...

(Modification Notice)

**Timeliness of the Filing of the Section 3060(b) Modification Protest**

6. The date that Western Truck received the notice is critical because, although the notice of  
modification was sent on June 15, 2020, Western Truck’s Section 3060(b) modification protest was not  
filed until 11 months later, on May 19, 2021.

7. Section 3060(b) provides in part as follows:

<sup>3</sup> The parties disagree as to whether the principal terms at issue, requiring Volvo Trucks’ approval for Western  
Truck to expand the product lines for the other franchises and regarding Volvo Trucks’ right of first refusal to  
purchase the dealership if there is an intended transfer or sale of the ownership of the dealership, are intended  
modifications that substantially affect Western Truck’s sales or service obligations or investment. Although the  
parties address these in their briefs, these disputes need not be resolved in connection with the issue of whether the  
protest was timely filed.

1 Within 30 days of receipt of the notice, satisfying the requirement of this section, or within  
2 30 days after the end of any appeal procedure provided by the franchisor, a franchisee may  
3 file a protest with the board and the modification or replacement does not become effective  
4 until there is a finding by the board that there is good cause for the modification or  
5 replacement.

6 8. As stated above, the notice sent to Western Truck contained the following in the required  
7 format:

8 You must file your protest with the board within 30 calendar days of your receipt of this  
9 notice or within 30 days after the end of any appeal procedure provided by the franchisor or  
10 your protest rights will be waived.

11 9. Section 3060(b) provides alternative time periods for the filing of a timely protest.  
12 The first is within 30 days from the time the notice of modification is received, and the alternative  
13 is within 30 days after the end of any appeal procedure provided by the franchisor.

14 10. As to the first alternative, filing a protest within 30 days of receipt of the notice, there are  
15 two claimed dates for receipt of the notice of modification.

16 11. First, Volvo Trucks claims the notice was received by Western Truck on June 17, 2020. If  
17 the notice of modification was received by Western Truck on June 17, 2020 as alleged by Volvo Trucks,  
18 Western Truck would have had until July 17, 2020 to file a timely protest. The Protest, filed on May 19,  
19 2021, was filed 10 months beyond the end of this 30-day time period. Thus, if the notice of modification  
20 was received by Western Truck on June 17, 2020, (and if there is no alternative time period allowed) the  
21 protest is untimely, and the Board is without jurisdiction to consider the matter.

22 12. The second claimed date of receipt of the notice is November 25, 2020, as admitted by  
23 Western Truck. (Protest, p. 2, lines 20-21; Declaration of W. Christopher Crosby, ¶ 4)

24 13. Although Western Truck denies that it received the notice of modification in June 2020, it  
25 admits that the notice of modification was received on or about November 25, 2020. If November 25,  
26 2020 were the first date on which Western Truck received the notice, Section 3060(b) would allow  
27 Western Truck 30 days from that date to file a timely protest (until December 28, 2020).<sup>4</sup> If the notice of  
28 modification was first received by Western Truck on November 25, 2020 as claimed by Western Truck,

---

<sup>4</sup> “When the last day for filing any instrument or other document with a state agency falls upon a Saturday or holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed.” (Gov. Code § 6707)



1 (and if there is no alternative time period allowed), the protest, filed almost 6 months later, on May 19,  
2 2021, is untimely and the Board is without jurisdiction to consider the matter.

3 14. If either claimed date of receipt is used to trigger the start of the 30-day period within  
4 which Western Truck must file its protest (received on June 17, 2020 as claimed by Volvo Trucks or  
5 received on November 25, 2020 as admitted by Western Truck), the protest, filed on May 19, 2021, is  
6 untimely.

7 15. The only way the protest can perhaps be deemed timely filed is through the application of  
8 the alternative time period provided by Section 3060(b) which is to find that Western Truck filed its  
9 protest "... within 30 days after the end of any appeal procedure provided by the franchisor..." As  
10 Western Truck states in its opposition, "[c]ontrary to Respondent's motion, however, Protestant does not  
11 claim that it timely filed a protest under the provision of the statute that alternatively permits filing of a  
12 protest within 30 days of receipt of [the] franchisor's statutory notice. Rather, Protestant confirms that it  
13 did not receive the Modification Notice when Respondent sent it in June 2020, likely because of the  
14 disruptions from the pandemic, which Mr. Yoes appears to have acknowledged.<sup>5</sup> Protestant also  
15 confirms that it initiated Respondent's ADR Procedure, in good faith, when it actually received the  
16 Modification Notice in November 2020 without delay, and the parties tried to resolve the dispute in the  
17 normal course of business. (Crosby Decl., ¶ 5)." (Protestant's Opposition, p. 12, lines 1-8)

18 16. Protestant alleges that after it received the notice on or about November 25, 2020,<sup>6</sup> it  
19 participated in "the appeal procedure provided by Respondent in the existing Franchise" dated  
20 September 1, 2015, by engaging in a series of communications regarding the proposed modifications.  
21 According to Protestant, both "Protestant and Respondent each fully participated and complied with all  
22 of the procedures and requirements of Respondent's appeal procedure, as set forth in the existing  
23 Franchise." (Protest, p. 2, lines 22-27; Respondent's Motion to Dismiss, Ex. A, David A. Winner  
24 Declaration, at Ex. 8) On or about May 4, 2021, "Respondent rejected Protestant's request that

25 <sup>5</sup> Ryan Yoes is the Regional Dealer Development Director for the Western Region for Volvo Group North America,  
26 Inc., which includes California. (Respondent's Motion to Dismiss, Ex. B, Declaration of Ryan Yoes, ¶ 2)

27 <sup>6</sup> It is still necessary to determine if the notice was received by Western Truck on June 17, 2020, as, if the notice  
28 was in fact received by Western Truck on that date, the alternative of allowing a protest to be timely if filed within  
30 days after the end of any appeal procedure would not be applicable as Western Truck states that it did not begin  
what it calls the appeal procedure until more than five months had passed from June 17, 2020.

1 Respondent not modify or replace its existing Franchise, ending the appeal procedure provided by  
2 Respondent.” (Protest, p. 3, lines 1-3) Therefore, according to Western Truck, the protest filed on May  
3 19, 2021, is timely under Section 3060(b)(1) as it was “filed within 30 days after the end of the appeal  
4 procedure provided by Protestant [*sic*] in the existing Franchise.”<sup>7</sup> (Protest, p. 3, lines 3-5) (Additional  
5 information regarding this claim is provided below.)

### 6 **MOTION TO DISMISS**

7 17. Volvo Trucks filed its Motion to Dismiss on July 16, 2021. In this motion, Volvo Trucks  
8 argues that the protest should be dismissed as untimely.

9 18. Volvo Trucks makes the following arguments:

10 (a) The notice of modification was received by Western Truck on June 17, 2020. The time to  
11 file a protest expired on July 17, 2020 and the protest was not filed until May 19, 2021 (10 months  
12 beyond the 30-day period). (Respondent’s Motion to Dismiss, p. 6, line 27 through p. 7, line 5)

13 (b) Even if the notice of modification was not received until November 25, 2020 (as admitted  
14 by Western Truck) the time to file a protest expired on December 28, 2020 (accounting for the Christmas  
15 Holiday and weekend) and the protest was not filed until May 19, 2021 (five months beyond the 30-day  
16 period). (Respondent’s Motion to Dismiss, p. 7, line 19-22)

17 (c) The alternative time of 30 days after the end of an appeal procedure provided by the  
18 franchisor is not applicable as Volvo Trucks does not provide an appeal procedure. (Respondent’s  
19 Motion to Dismiss, p. 2, line 23-25) What is provided is an “Alternative Dispute Resolution Process”  
20 which, by its own terms only applies to the September 1, 2015 Dealer Agreement (the franchise). It  
21 includes three stages leading up to and concluding with mediation or arbitration, both in accordance with  
22 the American Arbitration Association procedures. This protest, according to Volvo Trucks, is not about  
23 the September 1, 2015 Dealer Agreement but about the modified Dealer Agreement. Accordingly, there  
24 was no appeals process for the modified Dealer Agreement. Volvo Trucks alleges this is not an “appeal  
25 procedure provided by the franchisor” and even if it were, it was not timely invoked by Western Truck.  
26 (Respondent’s Motion to Dismiss, p. 8, lines 2-19; Ex. A, David A. Winner Declaration, at Ex. 1

---

27  
28 <sup>7</sup> Section 3060(b)(1) permits the filing of a protest “within 30 days after the end of any appeal procedure provided by the franchisor.”

1 (September 1, 2020 Dealer Agreement), Ex. 8, Article 7 (September 1, 2015 Dealer Agreement))

2 **Analysis of Volvo Trucks’ First Claim that the June 15, 2020 Notice of**  
3 **Modification was Received by Western Truck on June 17, 2020**

4 19. The notice of modification was sent to all Volvo Trucks dealers in California. As noted in  
5 paragraph 4 *supra*, the notice in question was sent to Jon Warren, Western Truck Parts & Equipment  
6 Company LLC at 1925 Enterprise Blvd., West Sacramento, California, 95691-3426 by Certified Mail,  
7 Return Receipt Requested. Mr. Warren was Western Truck’s President at the time the notice was sent.

8 (Respondent’s Motion to Dismiss, p. 2, lines 15-22)

9 20. Volvo Trucks submitted a United States Postal Service (“USPS”) Tracking Notice  
10 indicating that the notice from Volvo Trucks was delivered to the front desk, reception area, or mail  
11 room at 12:07 p.m. on June 17, 2020, in West Sacramento, CA 95691. (Respondent’s Motion to  
12 Dismiss, p. 2, lines 22-23; Ex. A, David A. Winner Declaration, at Ex. 2) Volvo Trucks also submitted a  
13 copy of the return receipt shown below.<sup>8</sup>

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 \_\_\_\_\_

28 <sup>8</sup> The return receipt is at times referred to as “the green card.”

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	A. Signature <input checked="" type="checkbox"/> C-19 SIA <span style="float: right;"><input type="checkbox"/> Agent <input type="checkbox"/> Addressee</span>	
1. Article Addressed to: Jon Warren Western Truck Parts & Equipment Company LLC 1925 Enterprise Blvd West Sacramento, CA 95691-3426	B. Received by (Printed Name) 9103	C. Date of Delivery
 9590 9402 5122 9092 6393 52	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
2. Article Number (Transfer from service label) 7019 0700 0000 8161 1850	3. Service Type <input type="checkbox"/> Adult Signature <span style="float: right;"><input type="checkbox"/> Priority Mail Express®</span> <input type="checkbox"/> Adult Signature Restricted Delivery <span style="float: right;"><input type="checkbox"/> Registered Mail™</span> <input checked="" type="checkbox"/> Certified Mail® <span style="float: right;"><input type="checkbox"/> Registered Mail Restricted Delivery</span> <input type="checkbox"/> Certified Mail Restricted Delivery <span style="float: right;"><input type="checkbox"/> Return Receipt for Merchandise</span> <input type="checkbox"/> Collect on Delivery <span style="float: right;"><input type="checkbox"/> Signature Confirmation™</span> <input type="checkbox"/> Collect on Delivery Restricted Delivery <span style="float: right;"><input type="checkbox"/> Signature Confirmation Restricted Delivery</span> <input type="checkbox"/> Insured Mail <span style="float: right;"><input type="checkbox"/> Mail Restricted Delivery</span>	
PS Form 3811, July 2015 PSN 7530-02-000-9053		Domestic Return Receipt

(Respondent's Motion to Dismiss, Ex. A, David A. Winner Declaration, at Ex. 3)

21. As can be seen, there is no signature in block A of the return receipt. Instead it has "C-19" and what appears to be something similar to "SIA" or "SNA." In block B, instead of the printed name of the recipient, it has "9103." None of this could be explained by counsel in their initial briefs or during the hearing on the Motion to Dismiss held on August 26, 2021.

22. However, subsequent to this hearing, counsel for Volvo Trucks learned that the USPS, as of at least March 20, 2020, due to the COVID-19 pandemic, had changed its procedures regarding the delivery of mail requiring a customer's signature showing receipt. (Respondent's Supplemental Reply, Ex. G, Declaration of Billy Donley, at Exs. 10-11)

23. A portion of the USPS change in procedures that applies to all letter carriers, states:

- Avoid ringing the doorbell when possible. Knock on the customer's door. Avoid areas that may be frequently touched when knocking.
- While maintaining a safe, appropriate distance, employees will request the customer's first initial and last name.
- For increased safety, employees will ask the customer to step back a safe distance or close the screen door/door so that they may leave the item in the mail receptacle or appropriate location by the customer door.

- If there is no response, employees will follow the normal Notice Left process.
- If there are delivery points on the route where social distancing recommendations are difficult to follow, alternative delivery methods can be explored.

(Respondent’s Supplemental Reply, Ex. G, Declaration of Billy Donley, at Ex. 10)

24. While the above explains some of the information contained on the return receipt, (C-19 presumably for COVID-19), there is nothing to indicate whether the letter carrier “requested the customer’s first initial and last name” but, even if the carrier did, the carrier did not include this information that should probably have been printed in Block B of the return receipt where it states, “Received by (Printed Name).”

25. Western Truck asserts that Section 3060(b)(1) requires that the notice be “received,” not merely “delivered,” and that Code of Civil Procedure section 1020(a)<sup>9</sup> “establishes a ‘disputable presumption’ that any notice required by law was received by the person to whom the notice was required to be sent if the notice was sent by registered mail and ‘a returned receipt purporting to be signed by the addressee’ is produced.... But Respondent here did not submit a returned receipt signed by Protestant.” (Protestant’s Response to Respondent’s Supplemental Reply, p. 2, lines 10-17)

26. Western Truck alleges that the disputable presumption should not arise as there was neither a return receipt signed by the addressee nor was there compliance with the changes made by the USPS regarding return receipts due to the COVID-19 pandemic. (Protestant’s Response to Respondent’s Supplemental Reply, p. 2, lines 17-21; p. 3, lines 6-8) Western Truck further alleges that even if the disputable presumption arose, it was rebutted by the declaration of Christopher Crosby, Vice-President of the management company that operates Protestant, in which Mr. Crosby attested that he “inquired within Protestant’s organization and can confirm that Protestant did not receive the Modification Notice on or around June 17, 2020.” (Protestant’s Response to Respondent’s Supplemental Reply, p. 3, lines 10-

---

<sup>9</sup> Subdivision (a) of Section 1020 of the Code of Civil Procedure provides: “Any notice required by law, other than those required to be given to a party to an action or to his attorney, the service of which is not governed by the other sections of this chapter and which is not otherwise specifically provided for by law, may be given by sending the same by registered mail with proper postage prepaid addressed to the addressee’s last known address with request for return receipt, and the production of a returned receipt purporting to be signed by the addressee shall create a disputable presumption that such notice was received by the person to whom the notice was required to be sent.”

14; Declaration of W. Christopher Crosby in Support of Protestant’s Opposition, ¶3)

2                                   **Conclusion as to Volvo Trucks’ First Claim that the June 15, 2020 Notice of**  
3                                   **Modification was Received by Western Truck on June 17, 2020**

4                   27.       It is determined that Western Truck is correct as to all of the above assertions. There was  
5 not a return receipt signed by an agent in behalf of Western Truck. The USPS carrier did not comply  
6 with the USPS requirement for return receipts for certified mail.<sup>10</sup> Because neither of these events  
7 occurred, the presumption of receipt by Western Truck of the notice of modification on June 17, 2020,  
8 did not arise.

9                                   **Western Truck’s Receipt of the Notice on November 25, 2020**

10                   28.       Although Volvo Trucks did not establish that Western Truck received the notice of  
11 modification in June 2020, Western Truck admits that it received the notice on November 25, 2020.  
12 Western Truck makes no claim that it filed a protest within 30 days of that date but that “[o]nce  
13 Protestant received a copy of [the notice] in November 2020, Protestant initiated Respondent’s appeal  
14 procedure under the Dealer Agreement.” (Protestant’s Opposition, p. 4, lines 10-12) Protestant also  
15 alleges that “...the parties reached an impasse, and Protestant filed this protest within 30 days of ending  
16 that appeal procedure.” (Protestant’s Opposition, p. 4, lines 12-15)

17                                   **APPLICABLE LAW**

18                   29.       Section 331(a) defines a franchise as “a written agreement between two or more persons  
19 having all of the following conditions:”

- 20                   (1) A commercial relationship of definite duration or continuing indefinite duration.  
21                   (2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail new  
22                   motor vehicles ... manufactured or distributed by the franchisor or the right to perform  
23                   authorized warranty repairs and service, or the right to perform any combination of these  
24                   activities.  
25                   (3) The franchisee constitutes a component of the franchisor’s distribution system.  
26                   (4) The operation of the franchisee’s business is substantially associated with the franchisor’s  
27                   trademark, trade name, advertising, or other commercial symbol designating the franchisor.  
28                   (5) The operation of a portion of the franchisee’s business is substantially reliant on the  
franchisor for a continued supply of new vehicles, parts, or accessories.

30.       Section 331.1. defines a franchisee as “ ... any person who, pursuant to a franchise,

---

<sup>10</sup> This was included as part of Western Truck’s request for judicial notice.

1 receives new motor vehicles subject to registration under this code ... from the franchisor and who offers  
2 for sale or lease, or sells or leases the vehicles at retail or is granted the right to perform authorized  
3 warranty repairs and service, or the right to perform any combination of these activities.”

4 31. Section 331.2 defines a franchisor as “... any person who manufactures, assembles, or  
5 distributes new motor vehicles subject to registration under this code ... and who grants a franchise.”

6 32. Section 3050 provides, in part, as follows:

7 The board shall do all of the following:

8 ...  
9 (c) Hear and decide, within the limitations and in accordance with the procedure provided, a  
10 protest presented by a franchisee pursuant to Section 3060...<sup>11</sup>

11 33. Section 3060 provides in part as follows:

12 ...  
13 (b) (1) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of  
14 any franchise, no franchisor shall modify or replace a franchise with a succeeding franchise if the  
15 modification or replacement would substantially affect the franchisee’s sales or service  
16 obligations or investment, unless the franchisor has first given the board and each affected  
17 franchisee written notice thereof at least 60 days in advance of the modification or replacement.  
18 Within 30 days of receipt of the notice, satisfying the requirement of this section, or within 30  
19 days after the end of any appeal procedure provided by the franchisor, a franchisee may file a  
20 protest with the board and the modification or replacement does not become effective until there  
21 is a finding by the board that there is good cause for the modification or replacement. ...

22 34. In this case the “written agreement” needed for a “franchise” is the September 1, 2015  
23 “Volvo Trucks North America Dealer Sales and Service Agreement” signed by Edward Dobbs,  
24 Chairman of Western Truck and David Winner, Senior Vice President, Retail Development of Volvo  
25 Trucks. Pursuant to this agreement, “[n]otices to the Dealer shall be sent to the address shown on Page 1  
26 of this Agreement.” As noted above, the address is “Western Truck Parts & Equipment Company LLC,  
27 Western Truck Center, 1925 Enterprise Blvd [sic], West Sacramento, CA 95691-3426.” In the  
28 alternative, “notices may be sent to such other address as the party receiving the communication may  
have specified in writing.” (Respondent’s Motion to Dismiss, Ex. A, Declaration of David Winner, at

---

<sup>11</sup> This language empowers the Board to hear “a protest presented by a franchisee pursuant to Section 3060.” A protest presented beyond the time limits stated in Section 3060 would not be presented “pursuant to Section 3060” and the Board does not have the power to hear such a protest.

1 Ex. 8, pp. 1, 45-46 [Article 11.10.2 Addresses])

2 35. Section 3060 requires that the notice be “received” by the franchisee. As the Vehicle  
3 Code has no provision as to when a notice is deemed “received,” which is needed to determine when the  
4 30-day time to file a protest would commence to run under Section 3060, it is necessary to look  
5 elsewhere for guidance.

6 36. As the franchise is a contract for the sale of goods, it would come within the provisions of  
7 Division 2 of the California Uniform Commercial Code (“UCC”). If the contract comes within the scope  
8 of Division 2 of the UCC, then the definitions of terms as contained in Division 1 of the UCC would also  
9 be applicable.

10 37. Section 3060 states that the notice of modification must be “given” to the franchisee and  
11 the Board but also unambiguously states that the notice must be “received” by the franchisee with the  
12 time for filing a protest commencing to run from the receipt. The UCC distinguishes between when a  
13 notice is deemed to be “given” as compared to when a notice is deemed to be “received.”

14 38. The Dealer Agreement requires only that the modification notice be “given” to the  
15 franchisee. (Respondent’s Motion to Dismiss, Ex. A, Declaration of David Winner, at Ex. 8, p. 45  
16 [Article 11.10.1 Methods of Communication])

17 39. UCC section 1202(d) states: “(d) A person ‘notifies’ or ‘gives’ a notice or notification to  
18 another person by taking such steps as may be reasonably required to inform the other person in ordinary  
19 course, whether or not the other person actually comes to know of it.”

20 40. However, the Vehicle Code in Section 3060 requires that the franchisee “receive” the  
21 notice of termination.

22 41. As to when a notice is “received,” UCC section 1202(e) provides as follows:

23 (e) Subject to subdivision (f), a person “receives” a notice or notification when:

24 (1) it comes to that person’s attention; or

25 (2) it is duly delivered in a form reasonable under the circumstances at the place of business  
through which the contract was made or at another location held out by that person as the place  
for receipt of such communications.

26 42. In short, the difference between giving notice (as required by the franchise terms) and  
27 receiving notice (as required by the Vehicle Code) is that notice is deemed given when the notice is sent  
28 whether it is delivered or not, whereas a notice is not deemed received until it comes to that person’s



1 attention or is duly delivered.

2 43. UCC section 1202(e) means that, Western Truck, as the franchisee, is the only entity that  
3 must receive the modification notice under Section 3060. There is no statutory requirement that a  
4 specific individual receive the notice.

5 **ANALYSIS**

6 44. Western Truck had 30 days from its receipt of the modification notice or 30 days after the  
7 end of any appeal procedure provided by Volvo Trucks to file a protest. (Veh. Code § 3060(b)(1))

8 45. The notice dated June 15, 2020, was sent to Western Truck by Certified Mail, Return  
9 Receipt Requested. However, because of the COVID-19 pandemic, the USPS changed its procedures  
10 regarding the completion of the return receipt or green card. The return receipt, sent to Volvo Trucks,  
11 was not signed by any representative of Western Truck and the mail carrier who partially completed it  
12 did not comply with the USPS requirements regarding what should have been on the green card to  
13 establish receipt by Western Truck. Volvo Trucks cannot be faulted with regard to the above. Volvo  
14 Trucks acted reasonably in sending the notice by USPS Certified Mail, Return Receipt Requested, and  
15 the USPS tracking information indicated that the notice was delivered to Western Truck on June 17,  
16 2020. And, although, on its face, it appears that the green card returned to Volvo Trucks indicated that  
17 delivery was made on June 17, 2020, there is no signature by a representative of Western Truck. Also,  
18 unknown to Volvo Trucks at the time, the information on the green card did not meet the COVID-19  
19 induced USPS requirements needed for completing the return receipt.

20 46. There is nothing on the returned receipt that conclusively establishes that the notice dated  
21 June 15, 2020 was received by Western Truck. The declaration and exhibits, including the USPS  
22 documents, indicate that the notice dated June 15, 2020 was “given” but they do not establish that the  
23 notice was “received” by Western Truck as required by Section 3060 to trigger the start of the 30-day  
24 period to file a timely protest.

25 47. As stated above, had the June 15, 2020 notice been received on June 17, 2020, Western  
26 Truck would have had only until July 17, 2020 to timely file its protest under the first alternative  
27 provided in Section 3060(b). The protest was not filed until May 19, 2021, 10 months later. Also, if the  
28 notice had been received on June 17, 2020, Western Truck’s attempt to negotiate with Volvo Trucks

1 regarding the terms of the new franchise would not have been a timely attempt to utilize what Western  
2 Truck alleges is an “appeal procedure” as this did not begin until sometime after November 25, 2020,  
3 more than five months from June 17, 2020.

4 48. The only date that has been established for the notice to have been received by Western  
5 Truck is November 25, 2020 and there is no claim that a protest was filed within 30 days of that date.

6 49. The alternative period allowed by Section 3060(b) for filing a timely protest is “30 days  
7 after the end of any appeal procedure provided by the franchisor.” For this alternative to be available  
8 there would have to be an “appeal procedure” and it would have to have been “provided by the  
9 franchisor.”

10 50. It is determined that, for the following reasons, the Alternative Dispute Resolution  
11 (“ADR”) procedure contained in the September 1, 2015 franchise is not an “appeal procedure” provided  
12 by the franchisor and cannot be used by Western Truck to support its claim that its protest was timely.

13 51. The ADR procedure consists of three parts: Negotiation, Mediation and then Arbitration  
14 with both Mediation and Arbitration being conducted through the American Arbitration Association. If  
15 the ADR procedure is begun, but “Negotiation” does not resolve the dispute, it appears that Mediation is  
16 a mandatory next step as the franchise states in Article 7.3.1 Mediation Procedure: “If the dispute has not  
17 been resolved by Negotiation as set forth in Article 7.2 above within 45 days of the disputing party’s  
18 notice, and the parties have failed to meet within 20 days, **the matter shall be submitted to the**  
19 **American Arbitration Association (“AAA”)** or its successor, for mediation under the Commercial  
20 Rules.” (Emphasis added; Respondent’s Motion to Dismiss, Ex. A, Declaration of David Winner, at Ex.  
21 8, p. 30)

22 52. Thus, to utilize the ADR procedure to finality would require either agreement of the  
23 parties during negotiation,<sup>12</sup> or resolution of the dispute through the use of a third-party mediator, and if  
24 that does not resolve the dispute then perhaps finally submitting the dispute to the AAA for arbitration.  
25 This would not be considered an “appeal procedure provided by the franchisor” which would be seeking  
26 that those with authority at Volvo Trucks would make the decision that Volvo Trucks itself would

---

27  
28 <sup>12</sup> Of course, if the dispute has been resolved during the negotiation phase, there would no longer be a dispute.  
There would then be no need for mediation and the modification protest would be moot.

1 unilaterally reverse the decision to modify the franchise.

2 53. Even if this is an appeal procedure, Western Truck, contrary to its assertions, did not  
3 pursue the procedure to an “end” as stated in Section 3060(b). Western Truck alleges only that the  
4 negotiations were broken off, but Western Truck did not seek to have the dispute mediated as required  
5 by the language of the ADR procedure as quoted above.

6 54. Article 7.4.1 of the franchise pertains to Arbitration upon the failure of mediation and  
7 states: “If Negotiation followed by mediation as set forth in this Article fails to reach an equitable  
8 solution to the dispute within 90 days after commencement, then such dispute, controversy, or claim may  
9 be settled by final and binding arbitration administered by the AAA, in accordance with its applicable  
10 rules, before a single arbitrator as selected through the AAA process....”<sup>13</sup>

11 55. It is concluded that the alternative time for filing a protest of “30 days after the end of any  
12 appeal procedure provided by the franchisor” is not applicable under these facts as:

13 (a) The ADR provisions do not constitute an appeal procedure;

14 (b) It is not a “procedure provided by the franchisor” as it relies upon a third-party, a  
15 mediator or arbitrator provided by the AAA; and,

16 (c) Even if the ADR provisions were an appeal procedure, Western Truck did not comply  
17 with its terms. Western Truck did not pursue the ADR in accordance with its terms nor to an “end” as  
18 required by the ADR procedure. Therefore, the time to file a protest was not extended by the alternative  
19 language of Section 3060(b) which permits a protest to be filed within 30 days after the “end of any  
20 appeal procedure provided by the franchisor.”

21 (d) Thus, the only time limit applicable to the filing of a protest is that stated in Section  
22 3060(b) that the franchisee may file a protest with the Board within 30 days after receiving a notice of  
23 the proposed modification.

24 (e) As Western Truck admits that it received the notice on November 25, 2020, this time  
25 expired December 28, 2020 and no protest was filed until May 19, 2021.

26 56. There is no dispute that the Board has the inherent power to dismiss a protest (without a  
27

28 <sup>13</sup> Unlike the Mediation provision which appears to be mandatory, the Arbitration provision appears to be optional with either party.

1 hearing on the merits of the protest) if the Board lacks jurisdiction over the parties or the protest. This  
2 may be due to the absence of a “franchise” (as defined in the Vehicle Code) or because the protest was  
3 not timely filed.

4 **CONCLUSION**

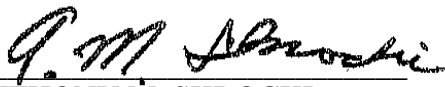
5 57. The protest filed by Western Truck was untimely. Western Truck admits it received the  
6 modification notice on November 25, 2020. The 30-day time to file the protest expired on December 28,  
7 2020 (accounting for Christmas holiday and weekend). Western Truck did not file the protest within 30  
8 days after the end of an appeal procedure provided by Volvo Trucks. As the protest was not filed until  
9 May 19, 2021, the protest is untimely and must be dismissed.

10 **PROPOSED ORDER**

11 After consideration of the pleadings, exhibits, and oral arguments of counsel, it is hereby ordered  
12 that Respondent’s Motion to Dismiss is granted. As the protest was not timely filed, the Board has no  
13 jurisdiction over this matter. *Western Truck Parts & Equipment Company LLC dba Western Truck*  
14 *Center, a California Limited Liability Company v. Volvo Trucks North America, a division of Volvo*  
15 *Group North America, LLC, a Delaware Limited Liability Company*, Protest No. PR-2740-21 is  
16 dismissed with prejudice.

17  
18 I hereby submit the foregoing which constitutes my  
19 proposed order in the above-entitled matter, as the  
20 result of a hearing before me, and I recommend this  
21 proposed order be adopted as the decision of the  
22 New Motor Vehicle Board.

23 DATED: November 23, 2021

24  
25 By   
26 ANTHONY M. SKROCKI  
27 Administrative Law Judge

28 Steve Gordon, Director, DMV  
Ailene Short, Branch Chief,  
Occupational Licensing, DMV