

NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

TRADEWAY CHEVROLET CO., INC.	)	
A California Corporation,	)	
	)	
Appellant,	)	Case No. A-24-72
	)	
v.	)	Filed: June 13, 1972
	)	
DEPARTMENT OF MOTOR VEHICLES,	)	
	)	
Respondent	)	

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Time and Place of Hearing:

May 10, 1972, 11:15 a.m.  
Director's Conference Room  
Department of Motor Vehicles  
2415 First Avenue  
Sacramento, California

For Appellant:

Don I. Asher  
Attorney at Law  
McFall, Burnett & Martin  
146 North Grant Street  
Manteca, CA 95336

For Respondent:

Honorable Evelle J. Younger  
Attorney General  
BY: Joel S. Primes  
Deputy Attorney General

FINAL ORDER

This is an appeal from a decision of the Director finding that Tradeway Chevrolet Co., Inc., hereinafter referred to as "appellant", had: (1) in 14 instances, "...included as an added cost to the selling price of..." 14 specified vehicles "...additional registration fees in excess of the fees due and paid to the State"; and (2) disconnected, turned back or reset the odometer on a

certain motor vehicle, or caused the same to be done, in order to reduce the mileage indicated on the odometer gauge.

It was further found that the overcharges for registration fees due the State were part of normal but sometimes inaccurate transactions and that the inaccuracies resulted in both overcharging and undercharging for such fees. After the Department reviewed appellant's operations, appellant made its own audit and found 84 instances of "overcharges" and 248 "undercharges" in some 2000 sales during a period of two years. Appellant lost \$2,639.00 in consequence of these errors. Appellant has repaid all but one of the customers overcharged as alleged in the accusation; i.e., in thirteen of the fourteen cases charged by the Department. However, in practice, prior to the audit, appellant had not reimbursed customers for overcharges unless requested by the customers.

Regarding odometer tampering, the director specifically found: The vehicle was driven from Oakland to Manteca on March 1, 1971, and that during that voyage the odometer was not disconnected. The distance between Oakland and Manteca is about 50 or more miles. The vehicle was thereafter driven on the same day, March 1, 1971, by one of appellant's salesmen for road demonstration for a potential customer. The customer called to the salesman's attention that the odometer was not connected. The vehicle was observed on appellant's lot on April 7, 1971, at which time the odometer registered 12 miles.

On April 7 or April 8, 1971, the salesman who gave the demonstration ride of March 1, 1971, commented to investigators for the Department of Motor Vehicles that he had, or would, connect the odometer because of their presence on the lot. The director further found that disclosure was not made to the ultimate purchaser of this vehicle that the odometer had been disconnected.

With respect to the finding that appellant charged customers an amount for registration and license fees in excess of those due the State, the Director of Motor Vehicles ordered that appellant's license, certificate and special plates be suspended for a period of 10 days. The entire suspension was stayed and appellant was placed on probation for a period of one year, subject to the condition that it make restitution of excess registration fees charged customers, including those revealed by appellant's own audit, and report to the Department of Motor Vehicles within 90 days of the effective date of the order its repayment of such fees, insofar as they can be accomplished, and obey all laws of the State of California and the regulations of the Department of Motor Vehicles governing its licensed business.

With respect to the finding involving odometer tampering, the Director of Motor Vehicles ordered that appellant's license, certificate and special plates be suspended for a period of twenty days, with fifteen days of the suspension

stayed, and appellant was placed on probation for a period of one year subject to the conditions previously mentioned.

On this appeal, appellant contends that the evidence does not support the findings.

DID APPELLANT INCLUDE AS ADDED COSTS TO THE SELLING PRICE OF VEHICLES AMOUNTS FOR REGISTRATION FEES WHICH AMOUNTS WERE NOT DUE THE STATE?

This question gives rise to two ancillary questions:

(1) Did appellant use a "package method" when representing the total cost of a vehicle to a retail buyer in the 14 transactions charged in the accusation and, (2) if so, does the use of the "package method" violate Section 11713(g)<sup>1/</sup> Vehicle Code? (All statutory references are to the Vehicle Code unless otherwise indicated.) For reasons hereinafter discussed, we answer the first question in the affirmative and the second one in the negative. In doing so, and in respect to the discussion which follows, we wish to emphasize the fact that appellant's "package method" appears to have been utilized only with respect to sales which did not involve conditional sale contracts or the provisions of the Automobile Sales Finance Act. (Section 2981 et. seq. Civil Code). The "package method" could not be used lawfully in transactions subject to that Act which specifically requires a separate statement of the amount

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<sup>1/</sup> This section provides that it is unlawful and a violation of the Vehicle Code for a vehicle dealer, "To include as an added cost to the selling price of a vehicle, an amount for licensing or transfer of title of the vehicle, which amount is not due to the state unless such amount has in fact been paid by the dealer prior to such sale." In the decision these fees are designated "registration fees" and we will hereinafter refer to them as "fees".

of transfer, registration and license fees in the conditional sale contract. (Section 2982 Civil Code). With respect to the charges involved in the accusation, there is no evidence whatsoever that the transactions involved conditional sale contracts or that the Automobile Sales Finance Act was applicable thereto, and respondent has made no reference to the Act in the administrative record. In this connection, we find it most perplexing that the department apparently selected 14 sales as the basis of its accusation wherein conditional sale contracts were not involved. Appellant's "package method" defense would have been inapplicable, and proof of "added cost" would have been sustained, had the department introduced into evidence conditional sale contracts drafted in compliance with Section 2982 Civil Code revealing that the customer had, in fact, been charged for registration fees amounts in excess of those due the State. There was no such proof.

The "package method" was described by Berthel Leroy Thompson, an employee of appellant, in the following colloquy between Mr. Thompson and counsel for appellant:

"A Usually, the customer is quoted a price with sales tax and license included in it. And this price is written on a work sheet and is given to the customer, and the customer has a chance to go home to mull the idea over and decide whether or not this is a competitive enough price to purchase an automobile.

"Q In other words, you give him all the price, to include all the costs, the tax, license, and registration fees, is that correct?

"A Right.

"Q And assuming the customer comes back and decides to buy the vehicle, what next transpires?

"A Then we, from this price, break out the sales tax, using a 5% chart. And then from taking the sales tax out, we try to determine how much the original license was for this vehicle." (Emphasis added) (A.T. 45:15-27.)<sup>2/</sup>

Because appellant gave the customer only a single dollar amount which covered the total cost to the customer for the vehicle, i.e., an amount to cover the car, all accessories, optional equipment, taxes and fees, before the fees were calculated, it is difficult to see how appellant could be said to have included any specific amounts for fees, much less an amount in excess of the fees due the State. Thus, in these 14 instances, appellant could not and did not "overcharge" for fees. Any amount appellant later computed and remitted to the State for fees which proved to be greater than the amount actually due to the State would be an overpayment of fees by appellant, not an overcharge of the customer. Neither Lou Blumberg nor Tim Blumberg referred to such amounts as "overcharges" when interviewed by departmental investigators. (A.T. 16:18.) Louis Blumberg did not regard the amounts in question as overcharges but considered them to be errors in bookkeeping. (A.T. 71:22-24.)

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<sup>2/</sup> "A.T." refers to the transcript of the proceedings before the Office of Administrative Hearings. The numbers following refer to the corresponding page and line number in the transcript.

The department produced no evidence to rebut appellant's contention that appellant used the "package method" when selling the automobiles involved in the transactions charged in the accusation.

It seems fundamental that one of the elements that must be proven before a licensed vehicle dealer can be found to have violated Section 11713(g) is that the dealer included as an "added cost" to the selling price of a vehicle an amount for fees. Nowhere in the administrative record can we find that this "added cost" element has been proven with respect to the transactions charged in the accusation.

Because we find that the "package method" as used by appellant in the sales involved in the accusation did not violate Section 11713(g), we reverse Finding of Fact III and Determination of Issues II of the Decision of the Director of Motor Vehicles.

IS THE FINDING THAT APPELLANT DISCONNECTED, TURNED BACK OR RESET THE ODOMETER, OR CAUSED THE SAME TO BE DONE, WITH THE INTENT TO REDUCE THE MILEAGE INDICATED ON THE ODOMETER GAUGE OF THE VEHICLE DESCRIBED IN FINDING IV SUPPORTED BY THE EVIDENCE?

The uncontroverted evidence relating to this question is as follows: Dahl Chevrolet, a dealer in Oakland, agreed to trade a new car for one of appellant's new cars. One of Dahl's employees drove the vehicle under its own power from Oakland to Manteca and delivered it to appellant's place of business. The distance between Oakland and Manteca is 50 or more miles. On the same day it arrived from Oakland and was

placed in appellant's inventory, the vehicle was demonstrated by one of appellant's salesmen to a prospective purchaser. The odometer was not operating during that demonstration ride. The odometer registered 12 miles when observed by a departmental investigator one week after the demonstration ride.

From these facts, it appears that the odometer mechanism was either inoperative before the vehicle was delivered to appellant in Manteca, or the mileage on the odometer gauge was reduced and the odometer rendered inoperative after the vehicle was delivered to appellant and before it was demonstrated for the customer on the day of its arrival from Oakland. If the former was the case, the odometer's inoperative condition could have been caused by mechanical malfunction or other cause, e.g., having been disconnected or rendered inoperative before it was delivered to appellant. If the latter was the case, a reasonable inference is that the appellant was responsible and violated the law.

The Director of Motor Vehicles specifically found that the vehicle was driven from Oakland to Manteca on March 1, 1971, and that, "The odometer was not then disconnected." Setting aside the fact that this finding does not rule out the possibility that the odometer may have been inoperative because of a mechanical malfunction during the trip from Oakland to Manteca, we are unable to find in the administrative record any substantial evidence to support the finding. The department's

burden of proof requires clear and convincing evidence.

"The findings, decisions and orders of administrative agencies must be supported by evidence of their action. While disciplinary proceedings involving a revocation or suspension of licenses are not criminal in nature, all intendments are in favor of the accused and the charges against him must be proved by clear and convincing evidence before the right to engage in the licensed profession or business may be taken away. An administrative determination must be supported by something more than suspicion or conjecture speculative, theoretical conclusions, surmise, fanciful and fictitious pretense, inherent improbability, or uncorroborated hearsay or rumor. However, findings may be based on circumstantial evidence; and plausible theoretical conclusions, reasonably and fairly drawn from competent testimony, may be given weight. Otherwise such conclusions have no probative merit." (Emphasis added.) (2 Cal.Jur.2d, Administrative Law and Procedure, Sec. 145.)

The department failed to meet the "clear and convincing evidence" test. From the record before us it cannot be concluded that it is more likely than not that the odometer was functioning when the vehicle departed from Oakland or, even if it was, that it did not cease to function during the trip from Oakland to Manteca, and, even if it ceased to function during the trip, that this did not occur from mechanical breakdown rather than tampering. The evidence only establishes, without conflict, that the odometer was not operating on the day it was delivered to appellant, after the delivery and, although it had traveled 50 miles or more, that the odometer reading, several days later, indicated only 12 miles. This is a failure of proof.

Perhaps some illumination could have been brought to this jungle of darkness if the department had produced John Fields, the employee of Dahl Chevrolet who drove the vehicle from

Oakland to Manteca. However, the department elected to merely subpoena the relevant records of Dahl Chevrolet. These records were brought to the hearing by Bill Curley, appellant's sales manager. Under questioning by the hearing officer, Mr. Curley testified that he did not disconnect the odometer and he replied in the negative when asked by the hearing officer. "Did anyone at Dahl?" (A.T. 27:3-9.) However, under cross-examination, the following colloquy took place between Mr. Curley and counsel for appellant:

"Q Now, you stated that no one from Dahl Chevrolet disconnected the speedometer?

"A Yes. I mean, as far as the 'get ready.' This is the wrong odometer here, and anything that is done to the car is put on here. Our dealer is a very conservative person as far as speedometers and he says there's none as far as this dealer trade. If we want them and need the car, we just take them. When that car left Dahl, I can't speak for him, but our 'get ready' man would not have disconnected it for anyone because he's instructed not to.

"Q Did you ever see this particular car?

"A I don't recall.

"Q And you don't recall whether or not you didn't disconnect it in any way?

"A No sir.

"Q You didn't order it disconnected?

"A No sir.

"Q Other than that you don't know whether it was or not?

"A Yes sir.

"Q You say when it leaves Dahl it's no longer your responsibility?

"A I didn't say that. When it leaves Dahl, I don't know what happens to it; after that it's out of my control."  
(A.T. 28:2-25.)

This testimony effectively destroyed the witness's previous testimony that no one at Dahl Chevrolet disconnected the odometer. Mr. Curley said he did not personally order the odometer disconnected and he did not see anyone perform the act of disconnecting. But, other than that, he did not know whether or not it had been disconnected. As far as the "get ready" was concerned, Mr. Curley was of the opinion that the employee performing this function would not have disconnected the odometer because he is instructed not to do so. This self-serving opinion that a particular employee of Dahl Chevrolet would not tamper with an odometer has little, if any, evidentiary value. The "get ready" man may have failed to follow instructions, or the act may have been performed by one other than this employee. Mr. Curley merely believed that the "get ready" man would not tamper with an odometer but he had no actual knowledge of whether or not the odometer on the vehicle was actually disconnected.

Appellant's owner, Louis Blumberg, testified that he had not been involved in odometer tampering whatsoever during his 35 years as an automobile dealer. (A.T. 68:6-10.) Department investigators found no automobile on appellant's premises with disconnected odometers. (A.T. 21:8-20.) The policy of the dealership was not to have vehicles on the premises disconnected; when this occurs, it is merely an oversight. (A.T. 61:5-8.) While Noel McNeer, appellant's salesman, thought disconnecting

odometers on dealer trades was not unlawful, it wasn't appellant's policy. (A.T. 59:13-14.) Appellant could only have been guilty of tampering with or rolling back the odometer. In any event, if the indicated mileage was erroneous due only to the odometer having been disconnected, it could only have been disconnected prior to delivery at Manteca.

Appellant produced evidence that could only lead to the conclusion that the odometer was not rolled back or otherwise reset. Stanley Martens, a Chevrolet dealer, testified that the odometer on new General Motors Corporation vehicles is manufactured in such a way that undetected tampering is precluded. (A.T. 40:24 to A.T. 41:3.) Dick Wilmhurst, another Chevrolet dealer, testified that odometers on General Motors Corporation vehicles were manufactured in such a way that resetting would be reflected by lines on the odometer figures. (A.T. 42:24 to A.T. 64:22.) While the hearing officer ruled this testimony of these three witnesses was hearsay, it is competent, pursuant to Section 11513 Government Code, to supplement the testimony of Louis Blumberg. (Epstein v. California Horse Racing Board, 222 Cal.App.2d 831; Benedetti v. Department of Alcoholic Beverage Control, 187 Cal.App.2d 213.)

Respondent has shown marked ambivalence toward its theory of the case throughout this proceeding with respect to the odometer tampering charge. While the department charged in

the accusation filed against appellant that appellant "...disconnected, turned back or reset the odometer, or caused the same to be done...", the department appears to have proceeded at the administrative hearing solely on the theory that the odometer was disconnected, rather than reset or turned back. The department proceeded to prove that there were less miles on the odometer than there should have been considering the fact that the vehicle had been driven from Oakland to Manteca; that appellant's salesman, Noel McNeer, thought it was not unlawful for a new car dealer to disconnect the odometer on a new vehicle (A.T. 10:15-22.); that Louis Blumberg either knew or didn't know that the vehicle was delivered to appellant's place of business with the odometer disconnected (A.T. 11:19-22.); and that Louis Blumberg stated to a departmental investigator it was appellant's policy not to accept on dealer trade a vehicle with more than normal factory mileage showing on the odometer (Department's Exhibit 4). Further attempts by the department to support its "disconnect" theory are found in the direct examination of another department investigator, Stanley Harkness. This witness was asked to relate his conversation with Mr. Blumberg concerning the latter's knowledge of two Vegas, one being the automobile received from Dahl Chevrolet, being driven over the highways with disconnected odometers. (A.T. 36:20-21.)

However, the department proceeded to rebut its "disconnect"

theory through its witness, Bill Curley, the sales manager of Dahl Chevrolet. His testimony with respect to disconnecting odometers and whether he personally knew whether Dahl Chevrolet disconnected the odometer is discussed above.

On the other hand, nowhere in the administrative record do we find any indication that the department introduced or attempted to introduce any direct evidence that the odometer was reset or turned back. In fact, there was no discussion of a turn-back during the hearing until the hearing officer, commencing at A.T. 38:9, asked questions of a departmental investigator concerning the reducing of mileage on an odometer other than through disconnecting. Subsequent thereto, appellant produced witnesses to show that the odometer on the Vega had not been reset or turned back. The department's response to this evidence was merely to characterize it as hearsay. (A.T. 14:25-26; A.T. 43:28; and A.T. 64:21.) It is also significant that the department made no attempt to elicit any testimony from appellant's owner, general manager or other employees of appellant concerning resetting or turning back odometers.

The department filed a written opening argument after the case was submitted to the hearing officer. It argued, most inconsistently, that: (1) the evidence established that Dahl Chevrolet does not disconnect odometers and would not have

authorized the odometer on the Vega to be disconnected prior to delivery, and (2) the odometer may have been disconnected or reset with the identity of the persons committing the wrongful act being within the knowledge of appellant or its "...associates and or agents for that purpose...", i.e., that Dahl Chevrolet may have been an agent of appellant's in committing the wrongful act. Of course, no attempt was made to produce evidence of an agency relationship.

In discussing the Vega in its reply brief on appeal to this board, the department stated, "The odometer was disconnected when it was transported from Oakland and when appellant showed it to prospective customers." The department then went on to state, "Disconnecting of odometers on new car dealer trades conforms with appellant's stated policy to not accept new vehicles with high mileage..." (Respondent's Reply Brief. 2:27 to 3:3) This argument, of course, is in direct contradiction of the finding of the Director of Motor Vehicles. In view of the finding of the director that the odometer was not disconnected when the vehicle was driven from Oakland to Manteca and the fact that the department did not attempt to prove anything other than a disconnect, an enormous hiatus appears.

It is apparent that the department has not proven any violation on appellant's part of Section 11713(n) by clear and convincing evidence as it is required to do. If we concurred

with the director's finding that the odometer was not disconnected at a time preceding or during the delivery of the Vega to appellant and also concurred with his finding that appellant violated Section 11713(n), we would then be called upon to infer that the odometer was turned back by appellant after taking delivery. We do not deem it appropriate to draw such an inference from the record before us in view of the evidence to the contrary which we have heretofore discussed and in view of the fact that there is no evidence in the record as to whether the odometer may have become inoperative from a mechanical malfunction during the trip to Manteca.

We have on several occasions in the past expressed our firm position that odometer tampering is a serious matter and the malefactor should be the recipient of severe sanctions. (Denis Dodge v. Department of Motor Vehicles, A-9-70; Zar Motors v. Department of Motor Vehicles, A-17-71; Chase-Nesse Auto, Inc. v. Department of Motor Vehicles, A-19-71; Rich Motor Co. v. Department of Motor Vehicles, A-16-71). We are, however, equally firm in our position that sanctions should be imposed only upon the proper party. The department has not established that this appellant was that party. The evidence on the ultimate issue simply was wanting. It follows that Finding of Fact IV and Determination of Issues III of the Decision of the Director of Motor Vehicles must be and are reversed.

Paragraph II of the Order of the Director of Motor Vehicles is reversed in its entirety.

This Final Order shall become effective when served upon the parties.

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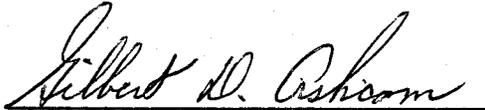
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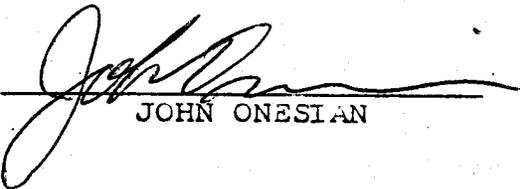
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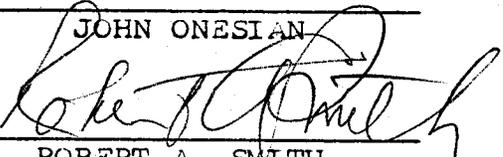
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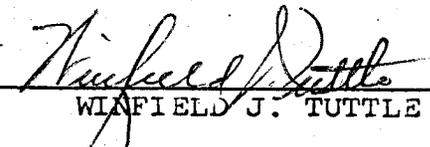
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