



1 NEW MOTOR VEHICLE BOARD  
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CERTIFIED MAIL

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8 STATE OF CALIFORNIA  
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of )  
12 ADVANTAGE LOMA LINDA, LLC dba ) Protest No. PR-1809-02  
13 ADVANTAGE SAAB, )  
14 Protestant, )  
15 v. ) PROPOSED ORDER RE:  
16 SAAB CARS USA, INC., ) RESPONDENT'S MOTION TO  
17 Respondent. ) DISMISS AND STRIKE PROTEST

18  
19 TO: Michael J. Steponovich, Jr., Esq.  
20 Attorney for Protestant  
21 STEPONOVICH & ASSOCIATES  
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22 701 South Parker Street, Suite 7500  
Orange, California 92868-4762

23 Patricia M. Coleman, Esq.  
24 Attorney for Respondent  
FEENEY KELLETT WIENNER & BUSH, LLP  
25 150 South Los Robles Avenue  
Suite 400  
Pasadena, California 91101

26  
27 FACTUAL AND PROCEDURAL BACKGROUND

28 1. Protestant, Advantage Loma Linda, LLC dba Advantage Saab

1 ("Advantage") is operating as an authorized Saab Service Center and is  
2 located at 25072 Redlands Boulevard, Loma Linda, California.

3 2. Respondent, Saab Cars USA, Inc., ("Saab"), is a distributor of  
4 Saab products and is located at 4405A International Boulevard, Norcross,  
5 Georgia.

6 3. Representatives of the parties signed a "Saab Authorized  
7 Service Center Agreement" ("Service Agreement") with an effective date  
8 of July 9, 1999. The Service Agreement provided for "a term of six (6)  
9 months and then continuing on a month to month basis". The Service  
10 Agreement also provides that either party may terminate without cause by  
11 written notice "with termination to be effective one (1) month after the  
12 other party's receipt of the notice."

13 4. By letter dated May 9, 2002, Saab gave Advantage notice that  
14 Saab was "exercising its right of termination without cause, effective  
15 sixty (60) days upon receipt".

16 5. On May 29, 2002, Advantage filed a protest with the New Motor  
17 Vehicle Board ("Board") seeking a hearing before the Board pursuant to  
18 the provisions of Vehicle Code sections 3060 and 3061<sup>1</sup>.

19 6. On July 21, 2002, Saab filed a Motion to Strike and Dismiss  
20 Protest asserting that the Board is without jurisdiction to hear the  
21 protest as the Service Agreement is not a "franchise" as defined in  
22 section 331(b) and Advantage is not a "franchisee" as defined in section  
23 331.1.

24 7. On August 7, 2002, Advantage filed its Opposition to Motion to  
25 Strike and Dismiss Protest, and on August 13, 2002, Saab filed its reply  
26 to Advantage's opposition.

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27  
28 <sup>1</sup> All statutory references are to the California Vehicle Code  
unless otherwise indicated.

1 8. A scheduled telephonic hearing of the motion was held on  
2 August 22, 2002, before Anthony M. Skrocki, Administrative Law Judge.  
3 During the hearing, Advantage was represented by Michael J. Steponovich,  
4 Jr. of Steponovich & Associates, Inc., and Saab was represented by  
5 Patricia M. Coleman, of Feeney Kellett Wiener & Bush, LLP.

6 SAAB'S MOTION TO DISMISS THE PROTEST

7 Is the Saab "Authorized Service Center Agreement" a  
8 Franchise within the Definition of Vehicle Code section 331?

9 Applicable Vehicle Code Sections

10 9. For Advantage to have the protection of sections 3060 and  
11 3061, the Service Agreement would have to qualify as a "franchise"  
12 within the definition of section 331(a) and not be excluded by section  
13 331(b). Advantage would have to be a "franchisee" as defined in section  
14 331.1 and Saab would have to be a "franchisor" as defined in section  
15 331.2.

16 10. The relevant code sections, in part, are as follows:

17 Section 3050: "The board shall do all of the following:

18 ...  
19 (d) Hear and decide, within the limitations and in  
20 accordance with the procedure provided, a protest  
presented by a franchisee<sup>2</sup> pursuant to Section 3060...."

21 Section 3060:

22 "...no franchisor shall terminate or refuse to continue  
23 any existing franchise unless...

24 Section 3061:

25 "In determining whether good cause has been established  
26 for modifying, replacing, terminating or refusing to  
27 continue a franchise..."

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28 <sup>2</sup> Emphasis added.

1 Section 331.1 defines a franchisee as:

2 A "franchisee" is any person who, pursuant to a  
3 franchise, receives new motor vehicles subject to  
4 registration under this code, new off-highway  
5 motorcycles, as defined in Section 436, or new trailers  
6 subject to identification pursuant to Section 5014.1 from  
7 the franchisor and who offers for sale or lease, or sells  
8 or leases the vehicles at retail or is granted the right  
9 to perform authorized warranty repairs and service, or  
10 the right to perform any combination of these activities.

7 Section 331.2 defines a franchisor as:

8 A "franchisor" is any person who manufactures, assembles,  
9 or distributes new motor vehicles subject to registration  
10 under this code, new off-highway motorcycles, as defined  
11 in Section 436, or new trailers subject to identification  
12 pursuant to Section 5014.1 and who grants a franchise.

11 11. All of these sections have as the fundamental requirement for  
12 their application that there be a "franchise" which is defined in  
13 section 331 as follows:

14 Section 331:

15 (a) A "franchise" is a written agreement between  
16 two or more persons having all of the following  
17 conditions:

18 (1) A commercial relationship of definite duration  
19 or continuing indefinite duration.

20 (2) The franchisee is granted the right to offer  
21 for sale or lease, or to sell or lease at retail new  
22 motor vehicles or new trailers subject to identification  
23 pursuant to Section 5014.1 manufactured or distributed by  
24 the franchisor or the right to perform authorized  
25 warranty repairs and service, or the right to perform any  
26 combination of these activities.

27 (3) The franchisee constitutes a component of the  
28 franchisor's distribution system.

(4) The operation of the franchisee's business is  
substantially associated with the franchisor's trademark,  
trade name, advertising, or other commercial symbol  
designating the franchisor.

(5) The operation of the franchisee's business is  
substantially reliant on the franchisor for a continued  
supply of new vehicles, parts, or accessories.

(b) The term "franchise" does not include an  
agreement entered into by a manufacturer or distributor  
where all the following apply:

(1) The person is authorized to perform warranty  
repairs and service on vehicles manufactured or  
distributed by the manufacturer or distributor.

1 (2) The person is not a new motor vehicle dealer  
franchisee of the manufacturer or distributor.

2 (3) The person's repair and service facility is not  
3 located within the relevant market area of a new motor  
vehicle dealer franchisee of the manufacturer or  
4 distributor.

5 12. Therefore, it is necessary to analyze the terms of the Service  
6 Agreement to determine if it qualifies as a franchise.

7 **The Service Agreement Provisions**

8 13. The relevant portions of the Service Agreement include the  
9 following:

10 **Preliminary Provisions**

11 Saab and Service Center ("Advantage") wish to enter into  
12 an agreement whereby Saab will sell parts and accessories  
13 covered by this Agreement to Service Center for resale in  
connection with services performed by Service Center on  
Motor Vehicles.

14 **1. Definitions**

15 "Motor Vehicles" shall mean new passenger cars  
16 manufactured by Saab Automobile AB and distributed by  
Saab.

17 "Parts and Accessories" shall mean parts and accessories  
18 manufactured by or for Saab Automobile AB or for Saab,  
19 designed for use on Motor Vehicles and distributed by  
Saab.

20 **2. Authorization and Location**

21  
22 Service Center is not authorized to either purchase Motor  
23 Vehicles from Saab or sell Motor Vehicles (previously  
defined as new vehicles) to the consuming public.

24 **Application of the Statutory Definition of**  
25 **"Franchise" to the Service Agreement**

26 14. Does the Service Agreement satisfy all of the "conditions" of  
27 section 331 for it to be a franchise?

28 (A) There is a written agreement evidencing a commercial

1 relationship of definite duration or continuing indefinite duration.  
2 (Sec. 331(a)(1))

3 (B) Advantage was granted the right to "perform authorized  
4 warranty repairs and service". (Sec. 331(a)(2))

5 (C) Advantage does constitute a component of Saab's  
6 distribution system. (Sec. 331(a)(3))

7 (D) The operation of Advantage's business is substantially  
8 associated with Saab's trademark, trade name, advertising, or other  
9 commercial symbol designating Saab. (Sec. 331(a)(4))

10 (E) The operation of a portion of Advantage's business is  
11 substantially reliant on Saab for a continued supply of new ... parts or  
12 accessories. (Sec. 331(a)(5))

13 14. Stopping at this point would lead to the conclusion that  
14 Advantage is a "franchisee", however, section 331 continues with  
15 subdivision (b), as indicated above, and its provisions state that the  
16 Service Agreement is not a franchise if "all the following apply". Its  
17 application is as follows:

18 (A) Advantage is authorized to perform warranty repairs and  
19 service on Saab vehicles. (Sec. 331(b)(1)). The Service Agreement so  
20 provides.

21 (B) Advantage is not a new motor vehicle dealer franchisee of  
22 Saab. (Sec. 331(b)(2)). Section 426 defines "New Motor Vehicle Dealer"  
23 to be "... a 'dealer' as defined in Section 285, who, in addition to the  
24 requirements of that section, either acquires for resale new and  
25 unregistered motor vehicles from manufacturers or distributors of those  
26 motor vehicles or acquires for resale new and unregistered off-highway  
27 motorcycles from manufacturers or distributors of the vehicles..." The  
28 Service Agreement is limited only to authorizing Advantage to "service

1 and repair" Saab vehicles and its language specifically excludes any  
2 right to purchase vehicles from Saab or to sell new Saab vehicles to the  
3 consuming public. It was represented by counsel for both parties that  
4 to their knowledge and belief Saab had never sold any vehicles to  
5 Advantage during the term of the Service Agreement. The Protest  
6 document on its face recites only that "Protestant is a new motor  
7 vehicle dealer selling SAAB parts and service..." and does not state  
8 that Advantage acquires new vehicles from Saab for resale.

9 (C) Advantage's repair and service facility is not located  
10 within the relevant market area of a new motor vehicle dealer franchisee  
11 of Saab. (Sec. 331 (b) (3)). As stated in the uncontested Declaration of  
12 Michael Rice, National Marketing Representation Manager of Saab: "There  
13 is no authorized Saab new motor vehicle dealer franchisee located within  
14 a 10 mile radius of protestant Advantage Loma Linda, LLC dba Advantage  
15 Saab (Advantage)."<sup>3</sup>

16 CONCLUSION AS TO WHETHER THE SERVICE AGREEMENT IS A FRANCHISE

17 15. It is concluded that the Service Agreement is not a  
18 "franchise" within the definition of section 331 as it is excluded by  
19 the provisions of section 331(b).

20  
21 <sup>3</sup> Section 507 provides that "The 'relevant market area' is any  
22 area within a radius of 10 miles from the site of a potential new  
23 dealership." This section typically applies to an establishment or  
24 relocation of a dealership and allows franchisees of the same line-make,  
25 who are located within that 10-mile radius, the right to protest  
26 pursuant to sections 3062 and 3063. It may be that Saab intends to  
27 establish or relocate a Saab franchisee and that Advantage would have  
28 been within 10 miles of the proposed new location. The anomalous result  
could be that Advantage may have been able to protest, pursuant to  
section 3062, the attempted establishment or relocation of another Saab  
franchisee, but Advantage cannot protest its own termination. This  
issue is not before the Board and any perceived inequity that may arise  
under this anomaly would require legislative action to correct. Also,  
what the result would be if there did happen to be another existing Saab  
franchisee within 10 miles of Advantage need not be addressed at this  
time.

1 16. Because the Service Agreement is not a franchise, Advantage is  
2 not a "franchisee" and Saab is not a "franchisor". Therefore sections  
3 3060 and 3061 are not applicable.

4 OTHER CONTENTIONS OF ADVANTAGE

5 17. Advantage contends that Saab has waived its right to challenge  
6 the jurisdiction of the Board to hear the protest by submitting itself  
7 to the Board's jurisdiction. Advantage claims this occurred by Saab  
8 including on its notice of termination the notice required by section  
9 3060(a)(1)(C) that the dealer has a right to file a protest with the  
10 Board.

11 18. This argument is without merit as the parties cannot create  
12 jurisdiction where none existed. Nor can the parties waive subject  
13 matter jurisdiction.

14 19. Advantage also asserts that there are other written documents  
15 containing language stating that Advantage was to be authorized to  
16 purchase and resell new Saab motor vehicles. These documents were part  
17 of the application submitted by Advantage to Saab prior to the issuance  
18 of the Service Agreement. They were form documents of Saab pertaining  
19 to such things as the organization and capitalization of Advantage,  
20 proposed premises, personnel of Advantage, Saab exterior identification  
21 guidelines and payment therefore, license and tax information, public  
22 information and advertising, information technology equipment, security  
23 interests in Advantage's assets, an Automated Clearing House Agreement,  
24 Electronic Payment Authorization, and permission for sign usage. For  
25 the reasons stated below, none of these are controlling as to whether  
26 Advantage was franchised to purchase and resell new Saab vehicles.

27 20. The Service Agreement contains an effective date of July 7,  
28 1999. Many of the above documents are dated April, 1999, and all appear

1 to be part of Advantage's application for the Service Agreement. The  
2 Service Agreement at paragraph 28 contains the following language:

3 There are no other agreements or understandings, either  
4 oral or in writing, between the parties affecting this  
5 Agreement or related to the servicing of Motor Vehicles,  
6 or to Part (sic) or Accessories, except as specifically  
7 provided herein.

8 This Agreement cancels and supercedes all previous  
9 written or oral agreements between the parties except  
10 with respect to any indebtedness which may be owing to  
11 either party by the other.

12 Therefore, even if there were any prior agreements indicating a right to  
13 purchase and resell new Saab vehicles, the prior agreements, oral or  
14 written, would be discharged.

15 21. Also, to the extent that any prior documents may indicate a  
16 right to purchase new Saab vehicles, such documents would be  
17 contradictory with and thus superceded by the express language in the  
18 Service Agreement stating, "Service Center is not authorized to either  
19 purchase Motor Vehicles from Saab or sell Motor Vehicles to the  
20 consuming public".

21 22. In the event that the undated documents submitted by Advantage  
22 were subsequent to the date of the Service Agreement, they would not be  
23 effective to expand or vary the terms of the Service Agreement to  
24 include the right to purchase new vehicles from Saab because of  
25 Paragraph 28 of the Service Agreement which provides:

26 No change or modification to any printed portion of this  
27 Agreement shall be valid or binding upon Saab unless  
28 approved in writing by the Vice President-Sales &  
Marketing of Saab or the Regional Director for the region  
in which Service Center is located, or the individual(s)  
then holding such responsibilities.

29 23. If the documents came into existence subsequent to the Service  
30 agreement, the provisions purporting to give Advantage the right to buy

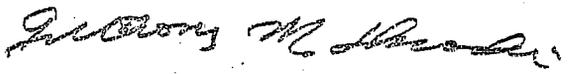
1 new Saab vehicles would be a "change or modification to" the "printed  
2 portion" of the Service Agreement which expressly excludes the purchase  
3 or re-sale of Saab vehicles. The documents as presented to the Board  
4 are not signed by the appropriate representatives of Saab as would be  
5 required by Paragraph 28.

6 PROPOSED ORDER RE: SAAB'S MOTION TO STRIKE AND DISMISS PROTEST

7 It is recommended that the Board issues its order as follows:  
8 Respondent's Motion to Strike and Dismiss Protest is granted. The  
9 protest is dismissed.

10  
11 I hereby submit the foregoing which  
12 constitutes my proposed order in the  
13 above-entitled matter, as a result of  
14 a hearing before me on the above date  
and recommend the adoption of this  
proposed order as the order of the  
New Motor Vehicle Board.

15 DATED: August 27, 2002

16  
17 By 

18 ANTHONY M. SKROCKI  
19 Administrative Law Judge  
20  
21  
22  
23  
24  
25  
26

27 Steven Gourley, Director, DMV  
28 Terri Thurlow, Chief,  
Licensing Branch, DMV