

NEW MOTOR VEHICLE BOARD  
1507 - 21st Street, Suite 330  
Sacramento, California 95814  
Telephone: (916) 445-2080

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of )  
)  
RDO TRUCK RIVERSIDE CO dba RDO ) Protest No. PR-1830-02  
TRUCK CENTER, a corporation, )  
)  
Protestant, )  
)  
v. )  
)  
AUTOCAR, LLC, a limited liability )  
company, )  
)  
Respondent. )  
\_\_\_\_\_ )

DECISION

The attached "Proposed Order on Motion to Dismiss or Stay Pending Arbitration" of the Administrative Law Judge was considered by the Public members of the New Motor Vehicle Board at its General meeting of January 8, 2003. After such consideration, the Public members of the Board moved to adopt the findings of the Administrative Law Judge and modify the Proposed Order as follows:

1. The Proposed Order is modified to read: The matter is stayed for six months until the September 16, 2003, General meeting pending a progress report from the parties on the status of the arbitration in Illinois including but not limited to whether a decision has been reached, whether the matter has

settled, or whether the arbitration is still pending.

The Public members of the Board adopted the Proposed Order on Motion to Dismiss or Stay Pending Arbitration as modified above as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 8<sup>th</sup> DAY OF JANUARY 2003.

*Glenn E. Stevens*

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GLENN E. STEVENS  
Vice President  
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 RDO TRUCK RIVERSIDE CO dba RDO )  
TRUCK CENTER, a corporation, )  
13 Protestant, )  
14 v. )  
15 AUTOCAR, LLC, a limited liability )  
16 company, )  
17 Respondent. )

Protest No. PR-1830-02  
PROPOSED ORDER ON MOTION  
TO DISMISS OR STAY  
PENDING ARBITRATION

18  
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1 breach within a certain time period (12.3), and those breaches which  
2 constitute grounds for immediate termination without a right to cure  
3 (12.4). Each of these sections begin with the language: "Subject to  
4 Section 16.9, Autocar may terminate this Agreement by written notice to  
5 Dealer..."

6 6. By a letter dated October 2, 2002, Autocar gave RDO notice  
7 that it considered RDO to be in breach of provisions of section 12.4 of  
8 the Agreement. The notice expressly stated that it was given pursuant  
9 to the Agreement and Section 3060 of the California Vehicle Code<sup>1</sup>, and  
10 gave the "Notice to Dealer" required by Section 3060 which advises the  
11 dealer of its right to file a protest with the New Motor Vehicle Board  
12 ("Board") and to have a hearing protesting the termination. The letter  
13 also gave the 15 day notice of termination provided by section 3060, and  
14 served a copy of the notice on the Board, as required by Section 3060.  
15 RDO filed a timely protest of the termination with the Board.

16 7. Pursuant to the duty imposed on it by Section 3060(a)(2), the  
17 Board advised Autocar that a timely protest had been filed, that a  
18 hearing was required under Section 3066, and that Autocar could not  
19 terminate the franchise until the Board had made its findings following  
20 the hearing that good cause existed for termination.

21 8. Thereafter, on November 26, 2002, Autocar filed the instant  
22 motion seeking dismissal of the protest proceeding on the asserted  
23 ground that the matter must be determined by arbitration, pursuant to  
24 the Agreement and the Federal Arbitration Act, 9 U.S. Code Section 2,  
25 ("FAA"). At the same time it filed a Demand for Arbitration with the  
26 American Arbitration Association in Illinois, and a Petition to Compel

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

1 Arbitration in the United States District Court, Northern District of  
2 Illinois.

3 9. The applicable law may be stated fairly simply. If the  
4 parties to a contract involving transactions in interstate commerce  
5 agree that disputes under the contract shall be determined by  
6 arbitration, the FAA preempts state laws which would require some other  
7 type of proceeding. See, Southland Corp v. Keating, 465 U.S. 1 (1984).

8 10. The parties to the contract, however, are free to avoid  
9 arbitration or limit arbitration to some circumstances and not others.  
10 While the FAA favors arbitration if the parties have provided for it,  
11 its real purpose is to ensure that the intention and agreement of the  
12 parties is carried out. See, Volt Information Sciences, Inc. v. Board  
13 of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989).

14 If arbitration would act to strip a party from some right granted by  
15 statute, courts will refuse to enforce an arbitration provision. See,  
16 Graham Oil Co v. Arco Production Co., 43 F.3d 1244 (9th Cir. 1994).

17 11. Thus, the determination of the instant motion involves an  
18 analysis of the intent and agreement of the parties, as shown from the  
19 face of the contract and the performance of the contract by the parties,  
20 and a determination whether arbitration of the matter, rather than a  
21 hearing before the Board, would result in the dealer losing some right  
22 granted to it by the Vehicle Code

23 12. Since this is a contract for the sale of motor vehicles  
24 between entities of different states, it does involve transactions in  
25 interstate commerce, and is subject to the FAA.

26 13. The face of the contract discloses that the parties generally  
27 intended that disputes under the contract would be resolved by  
28 arbitration.

1 14. Section 12 of the Agreement, dealing specifically with  
2 termination, however, expressly makes termination subject to Section  
3 16.9. Section 16.9 shows on its face that the parties agreed that the  
4 Illinois Motor Vehicle Franchise Act would be used to resolve disputes  
5 in Illinois, and that in other states which provide additional rights to  
6 dealers, those rights would be honored by Autocar.

7 15. RDO argues that this evidences an intention by the parties  
8 that, since the Vehicle Code grants a California dealer extensive rights  
9 when threatened with termination, including a hearing before the New  
10 Motor Vehicle Board, arbitration was not intended to apply to  
11 termination of the contract.

12 16. There is no question that those statutes do grant many  
13 important rights to California dealers, but a hearing before the Board  
14 is not necessarily one of them. Vehicle Code Section 11713.3 prohibits  
15 a manufacturer from requiring a dealer to prospectively agree to waive  
16 any rights under the code or to require any controversy to be referred  
17 to any person other than the Board, but it expressly goes on to state:  
18 "This subdivision does not, however, prohibit arbitration before an  
19 independent arbitrator." Even without this language, that would be the  
20 effect of the FAA's preemption of state laws which require hearings  
21 other than arbitration. Similarly, the Illinois franchise law referred  
22 to in section 16.9 also allows the parties to choose to have termination  
23 disputes heard by an administrative body or by an arbitrator.

24 17. Thus, the fact the Agreement reserves to RDO the rights  
25 granted to it by California, does not evidence an intention that  
26 disputes thereunder are not to be arbitrated; especially in light of the  
27 section 16.10 language requiring arbitration, and expressly stating that  
28 the additional rights protected by section 16.9 shall be applied by the

1 arbitrator.

2 18. RDO next argues that Autocar's performance under the contract  
3 shows that it did not understand that arbitration applied to  
4 termination, i.e., that by sending the statutory notice to terminate  
5 under Section 3060, it recognized that the Board was the proper forum to  
6 hear the matter.

7 19. Autocar points out that the Agreement has no specific form of  
8 written notice which is to be given, but that California does require a  
9 specific form of notice in order to initiate a termination, and to  
10 trigger the time within which the dealer may protest the threatened  
11 termination; thus, that was the form of notice which was given. It  
12 asserts that it was not intended, nor could it be understood, to somehow  
13 waive its right to require arbitration if the dealer did decide to  
14 protest the termination, because until such a protest was made, there  
15 was no dispute to be arbitrated.

16 20. When seen in light of the language of Sections 16.9 and 16.10  
17 of the Agreement, use of the statutory notice to terminate, in that it  
18 does trigger certain rights in the dealer which exceed those granted by  
19 the Agreement, was nothing more than an act by Autocar in compliance  
20 with its contractual duty to furnish the dealer with those additional  
21 statutory rights. While the notice does refer to Section 3060, and  
22 would normally result in a hearing before the Board, it does not  
23 necessarily call for that result if, as here, a timely demand for  
24 arbitration is made after a protest to the notice is filed. Giving the  
25 notice does not, therefore, provide any evidence of an intention by the  
26 parties that the arbitration provision of the Agreement is not  
27 applicable to a termination dispute in California.

28 21. The next issue is whether referral of the matter to

1 arbitration will strip the dealer of some statutory right which it would  
2 otherwise have before the Board. Clearly the Agreement requires Autocar  
3 to comply with any such rights, and the Arbitrator to apply those  
4 substantive rights in reaching its decision. At the hearing, counsel  
5 for Autocar acknowledged and affirmed that any arbitration proceeding  
6 would preserve to RDO its rights under the Vehicle Code. Those rights  
7 include the stay order previously issued by the Board remaining in  
8 effect until such time as a determination is made that good cause exists  
9 for termination, and that such determination will be made through a  
10 consideration of the "good cause elements" set forth in Section 3061 and  
11 the burden of proof set out in Section 3066, as well as other statutory  
12 rights that may become relevant as the matter progresses.

13 22. On the record now available, there is no basis for finding the  
14 dealer would lose any of its statutory rights merely because the matter  
15 is heard by an Arbitrator rather than the Board.

16 23. In sum, the Agreement provides for arbitration and such a  
17 provision will control unless it can be shown that the parties had some  
18 contrary intent, or unless referral to arbitration would strip a party  
19 of some statutory right. No such showings have been made.

20 24. Because no arbitration proceeding has been commenced, this  
21 matter should not be dismissed at this time, but should be stayed  
22 pending further order of the Board. If, for some reason, the matter  
23 does not seasonably proceed to arbitration, either party may request  
24 that this proceeding be reactivated. If an arbitration proceeding is  
25 commenced, Autocar should advise the Board of that fact and this  
26 proceeding can be dismissed.

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