

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

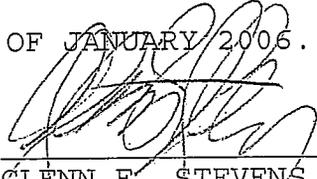
In the Matter of the Protest of)
)
SIX LEASING, INC. dba WABASH) Protest No. PR-1967-05
NATIONAL WEST, a California)
corporation,)
)
Protestant,)
)
v:)
)
WABASH NATIONAL CORPORATION, a)
corporation,)
)
Respondent.)

DECISION

At its regularly scheduled meeting of January 26, 2006, the Public members of the Board met and considered the administrative record and Proposed Order Granting Respondent's Motion to Dismiss and Strike Protest in the above-entitled matter. After such consideration, the Board adopted the Proposed Order as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 26th DAY OF JANUARY 2006.



GLENN E. STEVENS
Presiding Public Member
New Motor Vehicle Board

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CERTIFIED MAIL

8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

11 In the Matter of the Protest of)
12 SIX LEASING, INC. dba) Protest No. PR-1967-05
WABASH NATIONAL WEST,)
13 a California corporation,) PROPOSED ORDER GRANTING
14 Protestant,) RESPONDENT'S MOTION TO
DISMISS AND STRIKE PROTEST
15 v.)
16 WABASH NATIONAL CORPORATION,)
a corporation)
17 Respondent.)

19 To: Philip E. Silverman, Esq.
Attorney for Protestant
20 620 S. Euclid Street
Anaheim, California 92802

22 Maurice Sanchez, Esq.
Amy Toboco Kun, Esq.
23 Attorneys for Respondent
BAKER & HOSTETLER LLP
24 600 Anton Boulevard, Suite 900
Costa Mesa, California 92626

26 PARTIES

27 1. Protestant is Six Leasing, Inc. (hereafter "Six Leasing").
28 dba Wabash National West, a California corporation, located at 10641

1 Mulberry Ave., Fontana, California. Six Leasing states it is a "new
2 and used vehicle dealer selling and leasing trailers".

3 2. Respondent, identified as "Wabash National Corporation"¹
4 (hereafter "Wabash"), is the manufacturer and distributor of "Wabash"
5 brand trailers. The address of Wabash is shown as P.O. Box 6129
6 Lafayette, Indiana.

7 SUMMARY OF ISSUE

8 3. Respondent's motion to dismiss the protest is based upon the
9 contention that the Board does not have jurisdiction to hear the
10 protest because the agreement sought to be terminated involves
11 "trailers", which are not "motor vehicles", and that the statutory
12 definition of "franchise" excludes the agreement between the parties.

13 4. Protestant contends that the protest is within the Board's
14 jurisdiction as the statute defining a "franchise" specifically
15 includes "new trailers", and that the statutory definitions of
16 "franchisor" and franchisee" also include "new trailers" within the
17 types of vehicles listed.

18 PROCEDURAL BACKGROUND

19 5. By letter dated October 22, 2004, Wabash gave notice to Six
20 Leasing that Wabash intended to terminate its agreement with Six
21 Leasing "30 days from...receipt of this letter."

22 6. Almost nine months later, on July 15, 2005, Six Leasing
23 filed a protest with the Board. The body of the protest alleged that
24 the notice of termination from Wabash failed to comply with Vehicle
25

26 ¹ The pleadings filed with the Board indicate that Wabash is a corporation. However,
27 the dealer agreement which was supplied to the Board identifies Wabash as "Wabash
28 National L.P.", which may indicate that Wabash was a limited partnership when the
document was executed in 2001. However, the current status or capacity of Wabash is
not relevant to the issue involved.

1 Code² Section 3060³ because the notice provided only thirty-days notice
2 rather than the sixty days required by Section 3060(a)(1)(A); that the
3 notice did not contain the required statutory language giving "NOTICE
4 TO DEALER"; and that it was unlikely that a copy of the notice was
5 mailed to the Board.

6 7. If Wabash is correct that the trailer agreement is not
7 within the jurisdiction of the Board, the issue of Wabash's compliance
8 with the requirements of Section 3060 is moot.

9 8. If Six Leasing is correct that the trailer agreement is
10 within the jurisdiction of the Board, then the protest filed by Six

11 ² All references to statutes shall be to the Vehicle Code unless otherwise indicated.

12 ³ The caption of the protest as originally filed cited "V.C. SEC 3070", as did the
13 body of the protest. On August 1, 2005, an "AMENDMENT TO PROTEST" was filed
14 asserting that the references to Sections 3070 and 3071 were inadvertent and that the
15 references should be to Sections 3060 and 3061. This "error" and amendment would be
16 ignored but for the fact that the core of the contention here involves the type of
17 vehicle that is the subject of the "franchise" over which it is claimed the Board has
18 or does not have jurisdiction and the possibility of confusion exists. Section 3070
19 expressly applies to "a franchisor of a dealer of new recreational vehicles as
20 defined in subdivision (a) of Section 18010 of the Health and Safety Code", whereas
21 Section 3060 refers only to "a franchisor". Section 3070 applies to "new
22 recreational vehicles" as defined in Health and Safety Code section 18010. The
23 definition of "recreational vehicle" in Health and Safety Code Section 18010(a)
24 includes a "trailer" whether "self-propelled"... "or permanently towable on the
25 highways without a permit", but, among other things, the section also requires that
26 the trailer be "designed for human habitation". Although the Wabash vehicles are
27 towable trailers, it is unlikely that the Wabash trailers were "designed for human
28 habitation" and thus would not qualify as "new recreational vehicles", subject to the
Board's jurisdiction under Section 3070. Another potential problem in applying
Section 3070 could be that Section 3079 provides: "This article applies only to a
franchise entered into or renewed on or after January 1, 2004." This agreement was
entered into on November 19, 2001 for a term of one year, but with a provision
stating: "This agreement shall automatically renew for successive one-year
periods..." It is possible that, under this provision, the agreement would, for
purposes of Section 3079, be deemed "renewed" annually on its anniversary date, of
November 19. However, the notice of termination is dated October 22, 2004. The last
automatic renewal, prior to the letter of termination, would have occurred on
November 19, 2003, which would make that renewal date prior to the effective date of
the protection provided in Section 3070 (January 1, 2004). If the notice of
termination was required to be received by the Board (if the agreement is a
"franchise"), then it could be asserted that the notice of termination had no legal
effect and therefore there were automatic renewals on November 19, 2004 and November
19, 2005, either date of which would be after the effective date of the "article"
containing Section 3070.

1 Leasing would not be untimely, as the time to file the protest with the
2 Board would not commence to run until Wabash complied with the notice
3 requirements of Section 3060.

4 9. The ruling on the motion to dismiss will determine which of
5 the two above alternatives is applicable.

6 10. On October 3, 2005, Wabash filed "RESPONDENT WABASH NATIONAL
7 CORPORATION'S MOTION TO DISMISS AND STRIKE PROTEST".

8 11. On October 17, 2005, Six Leasing filed "PROTESTANT SIX
9 LEASING, INC. DBA WABASH NATIONAL WEST'S OPPOSITION TO RESPONDENT
10 WABASH NATIONAL CORPORATIONS'S MOTION TO DISMISS AND STRIKE PROTEST".

11 12. On October 21, 2005, Wabash filed "REPLY IN SUPPORT OF
12 RESPONDENT WABASH NATIONAL CORPORATION'S MOTION TO DISMISS AND STRIKE
13 PROTEST."

14 13. A hearing on the motion was scheduled to be held on November
15 1, 2005.

16 14. Upon reviewing the pleadings of the parties prior to the
17 hearing, Anthony M. Skrocki, an administrative law judge for the
18 Board, requested that there be an informal conference call with
19 counsel for the parties. This conference was held on October 25,
20 2005. Sharon McDaniel Corsiglia, Esq. of the law office of Phillip E.
21 Silverman, represented Protestant. Maurice Sanchez, Esq. of Baker &
22 Hostetler, LLP, represented Respondent.

23 15. During this conference, the administrative law judge queried
24 counsel about their interpretation of Section 331(b) and the possible
25 effect of this subsection upon the issue raised by the motion to
26 dismiss.

27 16. Counsel agreed to submit supplemental briefs addressing the
28 inquiries of the administrative law judge and, in order to have time

1 do so, agreed to reschedule the hearing from November 1, 2005 to
2 January 6, 2006.

3 17. On December 2, 2005, Wabash filed its "SUPPLEMENTAL BRIEF IN
4 SUPPORT OF RESPONDENT WABASH NATIONAL CORPORATIONS' S MOTION TO DISMISS
5 AND STRIKE PROTEST".

6 18. On December 19, 2005, Six Leasing, by facsimile transmission,
7 submitted its "SUPPLEMENTAL BRIEF IN OPPOSITION TO RESPONDENT WABASH
8 NATIONAL CORPORATION'S MOTION TO DISMISS AND STRIKE PROTEST". The
9 Board received the transmission on December 19, 2005, but did not
10 receive the original for filing until December 27, 2005.

11 19. On December 20, 2005, Wabash filed its REPLY IN SUPPORT OF
12 RESPONDENT WABASH NATIONAL CORPORATION'S SUPPLEMENTAL BRIEF IN SUPPORT
13 OF MOTION TO DISMISS AND STRIKE PROTEST".

14 20. The hearing on the motion was held on the agreed date,
15 January 6, 2006. Counsel for the parties were again Ms. Corsiglia and
16 Mr. Sanchez.

17 FACTS

18 21. Wabash is a manufacturer and distributor of "Wabash" brand
19 trailers. The trailers are not self-propelled. Wabash and Six
20 Leasing entered into a written dealership agreement on or about
21 November 19, 2001, by which Wabash appointed Six Leasing as a dealer
22 of Wabash brand trailers. Wabash is now seeking to terminate the
23 dealership agreement. Six Leasing claims it is entitled to protest
24 the termination pursuant to the provisions of Section 3060.⁴

25 ///

26 ///

27 ⁴ See footnote 3.
28

1 to Section 5014.1 manufactured or distributed by the
2 franchisor or the right to perform authorized warranty
3 repairs and service, or the right to perform any combination
4 of these activities.

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

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

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

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

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

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

22 (3) The person's repair and service facility is not
23 located within the relevant market area of a new motor
24 vehicle dealer franchisee of the manufacturer or
25 distributor. (Emphasis added.)

26 331.1. A "franchisee" is any person who, pursuant
27 to a franchise, receives new motor vehicles subject to
28 registration under this code, new off-highway motorcycles,
as defined in Section 436, new all-terrain vehicles, as
defined in Section 111, or new trailers subject to
identification pursuant to Section 5014.1 from the
franchisor and who offers for sale or lease, or sells or
leases the vehicles at retail or is granted the right to
perform authorized warranty repairs and service, or the
right to perform any combination of these activities.
(Emphasis added.)

331.2. A "franchisor" is any person who
manufactures, assembles, or distributes new motor vehicles
subject to registration under this code, new off-highway
motorcycles, as defined in Section 436, new all-terrain
vehicles, as defined in Section 111, or new trailers subject
to identification pursuant to Section 5014.1 and who grants a
franchise. (Emphasis added.)

28. Looking at just the bolded language in the above three
sections, it could easily be concluded that the dealer agreement
authorizing Six Leasing to sell or lease "Wabash" brand trailers would
be a "franchise" as defined in Section 331; that Six Leasing would be
a "franchisee" as defined in Section 331.1; and that Wabash would be a

1 "franchisor" as defined in Section 331.2 as all of these sections
2 include "new trailers".

3 29. If this bolded language was the only language applicable, it
4 would then be necessary to analyze other language in the pertinent
5 sections pertaining to a protest under Section 3060 or Section 3061,
6 or elsewhere, including Section 3050, where there are occasional
7 references to a "motor vehicle" or "motor vehicle facilities", etc. to
8 determine if "franchise" as used in Section 3060 was intended to mean
9 only "new motor vehicle" franchise, or, whether "franchise" includes a
10 "trailer franchise" due to its inclusion in the language shown in the
11 bolded language of the three sections above.

12 30. Wabash asserts that the 2001 legislative amendments to
13 Sections 331, 331.1, and 331.2, to include "trailers" was intended to
14 expand the authority of the Department of Motor Vehicles in the area
15 of licensing, etc.; that the legislature did not consider the effect
16 the amendments would have upon Sections 3000 et seq.; and that there
17 was no intent to expand the authority of the New Motor Vehicle Board
18 to include trailers. Had there been such an intent, Wabash argues,
19 the legislature would not have expanded the definitions of
20 "franchise", "franchisee", and "franchisor", but would have enacted
21 subject-matter-specific legislation for "trailers" as the legislature
22 did for "recreational vehicles" when it enacted Section 3070 et seq.,
23 or "at a minimum, it would have amended the definition of 'motor
24 vehicle' to include trailers." (Respondent's Motion to Dismiss, page
25 10, lines 23, 24.)

26 31. It would appear that the legislature did amend the
27 definition of "motor vehicle" to create somewhat of a "legislative
28 oxymoron" - that is a "motor vehicle" without a motor. This

1 definition is in Section 415 as follows:

2 415. (a) A "motor vehicle" is a vehicle that is self-
propelled.

3 (b) "Motor vehicle" does not include a self-propelled
4 wheelchair, motorized tricycle, or motorized quadricycle, if
operated by a person who, by reason of physical disability,
5 is otherwise unable to move about as a pedestrian.

6 (c) For purposes of Chapter 6 (commencing with Section
3000) of Division 2, "motor vehicle" includes a recreational
7 vehicle as that term is defined in subdivision (a) of
Section 18010 of the Health and Safety Code, but does not
include a truck camper.

8 32. As can be seen from this definition, to be a "motor vehicle"
9 under subsection (a) requires that the vehicle be self-propelled.

10 However under subsection(c), for purposes of the Board statutes,
11 (Section 3000, et seq.) "motor vehicle" includes a "recreational
12 vehicle" as defined in Section 18010(a) of the Health and Safety Code.

13 33. Section 18010(a) of the Health and Safety Code provides:

14 "Recreational vehicle" means both of the following:

15 (a) A motor home, travel trailer, truck camper, or camping
trailer, with or without motive power, designed for human
16 habitation for recreational, emergency, or other occupancy,
that meets all of the following criteria:...

17 (4) It is either self-propelled, truck-mounted, or
permanently towable on the highways without a permit....
(Emphasis added.)

18
19 34. Therefore, trailers can be included within the definition of
20 a "motor vehicle" even though they are "without motive power" and
21 "permanently towable". Thus a "motor vehicle" without a "motor" can
22 still be a "motor vehicle". (See also footnote 3.)

23 35. As can be seen in the language of Section 415, the
24 legislature did take care to include "recreational vehicles" in the
25 definition of "motor vehicle" for the purposes of the Board's
26 jurisdiction by stating "For purposes of Chapter 6 (commencing with
27 Section 3000) of Division 2...". These are the Board's enabling and
28 operating sections.

1 36. Although the legislature saw fit to include "recreational
2 vehicles" in the definition of "motor vehicle" by including what are
3 commonly called "RV trailers", even though they are not self-
4 propelled, the legislature did not include other "non-self-propelled
5 trailers" if they were not "designed for human habitation."

6 37. Six Leasing relies primarily upon the definitions as stated
7 in the language of Section 331(a)(2), as well as Sections 331.1 and
8 331.2 quoted above to support its claim that the Board has
9 jurisdiction.⁵

10 38. However, there is additional language in Section 331
11 (defining a franchise) which specifically excludes certain agreements
12 from the definition of a franchise. This language follows and is the
13 language which the parties were asked to address in their supplemental
14 briefs.

15 39. Section 331(b) provides:

16 ...

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

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

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

25 (3) The person's repair and service facility is **not**
26 **located within the relevant market area of a new motor**
27 **vehicle dealer franchisee** of the manufacturer or
28 distributor. (Emphasis added.)

25 ⁵ Six Leasing also argued that "the term 'motor vehicle' should include a trailer for
26 the following reason: the trailer is intended to be attached to a tractor which will
27 pull the trailer. When the trailer and tractor are joined together 'for the purpose
28 of both being moved over the highways, the two may become one motor vehicle.", citing
cases which so held for purposes other than the application of Section 3060.
(Respondent's SUPPLEMENTAL BRIEF IN OPPOSITION..., page 2, lines 11-16)

1 40. Although awkwardly worded with what appears to be a double
2 negative (or two), if all three of the listed factors are present
3 (that is if each can be answered in the affirmative), there would not
4 be a "franchise". Applying this language to the relationship between
5 Wabash and Six Leasing, results in the following questions and
6 answers.

7 41. Is Six Leasing authorized to perform warranty repairs and
8 service on Wabash brand trailers? Yes. This is not disputed.

9 42. Is Six Leasing not a new motor vehicle dealer franchisee of
10 Wabash? Yes. Six Leasing is not a "new motor vehicle dealer" as
11 defined in Section 426.⁶ To be a "new motor vehicle dealer" pursuant
12 to that section would require that Six Leasing acquire... "motor
13 vehicles from manufacturers or distributors of those motor
14 vehicles...". Because, as stated above, "motor vehicles" includes
15 "trailers" within the definition of "recreational vehicles" but only
16 if the trailers were "designed for human habitation", and it has not
17 been suggested that "Wabash" brand trailers were so designed, the
18 answer is "yes". Six Leasing is not a "new motor vehicle dealer" as
19 it does not "acquire...motor vehicles..." (the trailers are not
20 "camping trailers" or "travel trailers" and were not designed for
21 human habitation), and Wabash does not manufacture or distribute

22
23 ⁶ 426. "New motor vehicle dealer" is a dealer, as defined in Section 285, who, in
24 addition to the requirements of that section, either acquires for resale new and
25 unregistered motor vehicles from manufacturers or distributors of those motor
26 vehicles or acquires for resale new off-highway motorcycles, or all-terrain vehicles
27 from manufacturers or distributors of the vehicles. A distinction shall not be made,
28 nor any different construction be given to the definition of "new motor vehicle
dealer" and "dealer" except for the application of the provisions of Chapter 6
(commencing with Section 3000) of Division 2 and Section 11704.5. Sections 3001 and
3003 do not, however, apply to a dealer who deals exclusively in motorcycles, all-
terrain vehicles, or recreational vehicles, as defined in subdivision (a) of Section
18010 of the Health and Safety Code.

1 "motor vehicles" (again, because the trailers are not camping trailers
2 or travel trailers and were not designed for human habitation).

3 43. Is Six Leasing's repair and service facility not located
4 within the relevant market area of a new motor vehicle dealer
5 franchisee of Wabash? Yes. Wabash has no "new motor vehicle dealer"
6 franchisees. The term "relevant market area" is also defined in the
7 Vehicle Code, but its definition is not relevant due to the
8 impossibility for this factor to exist. Wabash has no "new motor
9 vehicle dealer" franchisees as Wabash does not manufacture or
10 distribute "motor vehicles" as none of its trailers come within the
11 definition of a recreational vehicle.

12 44. Therefore, in applying the three factors listed in Section
13 331(b), it is determined that the agreement between Wabash and Six
14 Leasing is not a "franchise" as defined in Section 331. This is so
15 even though Wabash may be a "franchisor" as defined in Section 331.2
16 and Six Leasing may be a "franchisee" as defined in Section 331.1.
17 (Just as there can be a "motor vehicle" without a motor, so might
18 there be a "franchisor" and "franchisee" without a "franchise".)

19 45. Because it has been found that the agreement between Wabash
20 and Six Leasing is not a "franchise" as defined in the Vehicle Code,
21 neither the provisions of Section 3060 nor the provisions of Section
22 3061 are applicable. Wabash is not required to comply with the
23 provisions of Section 3060 as to the giving of notice and Six Leasing
24 has no right to a hearing pursuant to Section 3061.

25 ///

26 ///

27 ///

28 ///

1 CONCLUSION AS TO WHETHER THE BOARD HAS
2 JURISDICTION TO HEAR THE PROTEST

3 46. It has been determined that Sections 3060 and 3061⁷ do not
4 apply because there is no "franchise" in existence between Wabash and
5 Six Leasing over which the Board would have jurisdiction.

6 PROPOSED ORDER

7 RESPONDENT WABASH NATIONAL CORPORATION'S MOTION TO DISMISS AND
8 STRIKE PROTEST is granted. The protest of Six Leasing, PR-1967-05, is
9 dismissed.

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

18 DATED: January 11, 2006

19 
20 By: _____
21 ANTHONY M. SKROCKI
22 Administrative Law Judge

23
24 Ken Miyao, Acting Director, DMV
25 Mary Garcia, Branch Chief,
26 Occupational Licensing, DMV

27 ⁷ The result would be the same if the protest had been filed under Section 3070. This
28 would be so because there would not be a "franchise" and Wabash is not a "franchisor
of new recreational vehicles" as required by Section 3070.