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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

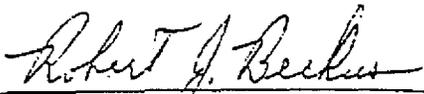
In the Matter of the Protest of)
THOMAS CADILLAC, INC.,) Protest No. PR-1101-89
Protestant,)
vs.)
RANGE ROVER OF NORTH AMERICA,)
INC.,)
Respondent.)

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 15TH day of December, 1989.



ROBERT J. BECKUS
President
New Motor Vehicle Board

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In the Matter of the Protest of)
THOMAS CADILLAC, INC.,)
)
) Protestant,)
)
) vs.)
)
) RANGE ROVER OF NORTH AMERICA, INC.)
)
) Respondent.)

Protest No. PR-1101-89
PROPOSED DECISION

PROCEDURAL BACKGROUND

1. By letter dated June 12, 1989, Range Rover of North America, Inc., ("Range Rover"), 4390 Parliament Place, Lanham, Maryland, gave notice pursuant to California Vehicle Code section 3060 1/ to Thomas Cadillac, Inc., ("Thomas"), 1076 West Seventh Street, Los Angeles, California, of Range Rover's intention to terminate the Range Rover franchise held by Thomas. The notice of termination was received by the New Motor Vehicle Board ("Board") on June 13, 1989.

1/ All statutory references are to the California Vehicle Code unless otherwise indicated.

2. The notice of termination stated, in pertinent part, that:

"... we intend to terminate your franchise agreement effective fifteen (15) days from the date of this notice as a result of your failure to conduct business for seven (7) consecutive business days during customary hours of business, including your failure to conduct customary sales and service operations, commencing June 2, 1989, in violation of your Dealer Agreement and the applicable Vehicle Code Sections, including Section 11713."

3. On June 19, 1989, Thomas filed a protest with the Board pursuant to the provisions of section 3060.

4. A hearing on the protest was held on September 25 and 26, 1989 before Marilyn Wong, Administrative Law Judge of the Board.

5. Range Rover was represented by Kate S. Lehrman, of Crowe and Day, 1888 Century Park East, Suite 1700, Los Angeles, California, and James Lehmann, General Counsel for Range Rover. Thomas was represented by John J. Harris of Demetriou, Del Guercio, and Lovejoy, 649 South Olive Street, Suite 500, Los Angeles, California.

ISSUES PRESENTED

6. Section 3066 imposes upon Range Rover the burden of establishing the existence of good cause to terminate or refuse to continue the franchise of Thomas.

7. In determining whether good cause has been established for terminating or refusing to continue a franchise, section 3061 requires the Board to take into consideration the existing circumstances, including, but not limited to:

(a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee;

(b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchisee;

(c) Permanency of the investment;

(d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted;

(e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public;

(f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee;

(g) Extent of franchisee's failure to comply with the terms of the franchise.

CONTENTIONS OF THE PARTIES

8. Range Rover contends that good cause exists to terminate the Range Rover franchise of Thomas due to Thomas' voluntary cessation of its business operations. Range Rover further contends that Thomas breached the dealer agreement by its failure to conduct business for seven (7) consecutive business days during the customary hours of business.

9. Thomas contends that Range Rover does not have good cause to terminate the franchise because Thomas' failure to conduct its dealership operations were beyond its control; namely, Thomas' loss of the lease of the dealership premises and the failure of Range Rover to approve Thomas' relocation plans and the "buy-sell" proposal submitted to Range Rover by Thomas.

FINDINGS OF FACT

I. Facts Relating To The Amount Of Business Transacted By Thomas, as Compared To The Business Available To It.
{Section 3061(a)}

10. Thomas began selling Range Rover vehicles in 1987. Thomas' present franchise agreement with Range Rover runs from May 1, 1988 to May 1, 1991.

11. Range Rover distributes a sport utility vehicle built by Land Rover Corporation, which is located in England. The Range Rover vehicle was introduced in 1970 in England and first marketed in the United States in March of 1987.

12. Between 15,000 and 20,000 Range Rover vehicles are manufactured for world-wide sales on a yearly basis. In 1989, it is estimated that between 4,500 and 5,000 Range Rover vehicles will be sold in the United States. The manufacturer's suggested retail price of the Range Rover is approximately \$39,000.

13. Given the relatively small number of imports yearly, the Range Rover vehicle is considered a "boutique item" ^{2/}.

^{2/} The term "boutique item", as used herein, refers to a high-priced, low sales volume vehicle which is not mass-produced and which appeals to a select group of consumers.

14. The buyers of Range Rover vehicles are those whose incomes are categorized at the highest level in demographic surveys utilized by automobile manufacturers and distributors.

15. Thomas ceased operation as a Range Rover dealer on June 2, 1989. This cessation of business was due to the conduct of Thomas which resulted in a reduction of the term of the lease pertaining to the premises upon which the dealership was located.

16. The performance by Thomas with respect to Range Rover sales, from the period of time between November of 1988 through May of 1989, is indicated by the following chart:

<u>Month</u>	<u>Sales</u>	<u>Sales YTD</u>	<u>National No. Rank</u>	<u>National YTD Rank</u>
December 1988	8	69	9	16
January 1989	9	9	N/A	N/A
February 1989	6	15	9	12
March 1989	12	27	5	12
April 1989	10	37	8	12
May 1989	8	45	9	9

Had Thomas remained in operation and continued to sell at the same rate as it did for the first five months of 1989, its sales would have totaled approximately 108 vehicles. Its planned business potential for 1989, according to Range Rover's calculations, was 100 vehicles.

II. Facts Relating To The Investment Necessarily Made And Obligations Incurred By Thomas To Perform Its Part Of The Franchise.

{Section 3061(b)}

17. Gerald Thomas is the president and dealer/principal of Thomas.

18. Thomas is a corporation whose five shareholders are Gerald Thomas and his father, brother, uncle, and cousin. The names of these other shareholders were not revealed at the hearing.

19. Thomas has been a Cadillac franchisee since 1965 and became a dual Cadillac/Range Rover dealership in 1987.

20. At the time Thomas acquired the Range Rover franchise, Thomas invested between \$50,000 and \$65,000 in order to comply with the terms of the franchise. This initial investment was recovered within two to three months after Thomas commenced operations as a Range Rover dealer.

III. Facts Relating To Permanency Of Thomas' Investment.

{Section 3061(c)}

21. Thomas was located at 1076 West Seventh Street, Los Angeles, California. Prior to 1988, this property was owned by Thomas Investments, a partnership consisting of two trusts involving Gerald Thomas' father, mother, aunt and uncle.

22. Thomas leased the buildings from Thomas Investments pursuant to a written lease dated January 17, 1985. The term of the lease was for ten (10) years. The lease was amended in early 1988 to provide

for the termination of the lease by mid-July 1989. A subsequent amendment of May 23, 1989 provided for the lease to terminate on June 4, 1989. No consideration was paid to Thomas for either of the lease amendments.

23. In January of 1988, the Los Angeles Times reported the sale of the dealership property by Thomas Investments to W & M Investments. Escrow closed in April of 1988.

24. Thomas sold its Cadillac business and the Range Rover inventory to Felix Chevrolet Company on June 6, 1989. The remaining assets of the business were sold after Thomas left the dealership facility.

25. The present lack of permanency of investment was a result of the sale of the dealership property in addition to the reduction of the term of the lease of the property.

IV. Facts Relating To Whether It Is Injuring Or Beneficial To The Public Welfare For The Business Of Thomas To Be Disrupted.

{Section 3061(d)}

26. The disruption of Thomas' business was caused by the voluntary reduction of the term of its leasehold interest by approximately 5 1/2 years. One of the reasons that Thomas reduced its leasehold interest was to facilitate the sale of the property by Thomas Investments to W & M Investments. Range Rover's notice of termination of the franchise was dated June 12, 1989, and was issued because of the cessation of business which occurred on June 2, 1989. As of the date of the notice of termination, Thomas had no business to disrupt.

V. Facts Relating To Whether Thomas Has Adequate Motor Vehicle Sales And Service Facilities, Equipment, Vehicle Parts, And Qualified Service Personnel To Reasonably Provide For The Needs Of The Consumers Of Range Rover Vehicles And Has Been And Is Rendering Adequate Services To the Public.

{Section 3061(e)}

27. As of the time that Thomas ceased Range Rover operations on June 2, 1989, Thomas had no sales or service facilities and was thus providing no parts for, nor services to, the public.

VI. Facts Relating To Whether Thomas Has Failed To Fulfill The Warranty Obligations Of Range Rover To Be Performed By Thomas.

{Section 3061(f)}

28. Thomas, due to its self-determined date of closure, is no longer able to perform warranty service on Range Rover vehicles and is therefore unable to fulfill its obligations to do so.

VII. Extent Of Thomas' Failure To Comply With The Terms Of The Franchise.

{Section 3061(g)}

29. The Range Rover Dealer Agreement states in pertinent part:

"12.3 Company may terminate this Agreement on fifteen (15) days written notice to Dealer upon the occurrence of any of the following events: ...

12.3.7 Failure of the Dealer Premises to operate as a going concern during the normal business hours customary for automobile dealerships in the Primary Area of Responsibility for a period of seven (7) consecutive business days, so long as such failure is not due to causes enumerated in Article 14.8.

14.8 Performance by each party of their respective obligations under this Agreement is subject to those contingencies which are beyond the reasonable control of the parties, including labor disputes or work stoppage, product delivery delays, governmental action or inaction, acts of God and events of Force Majeure. The obligations of the parties prevented from performing by virtue of the above shall be suspended during any such contingency without liability to the other for any direct or indirect damage and without extending the term of this Agreement."

30. Thomas' last day of operations was June 2, 1989. The notice of termination issued by Range Rover to Thomas was dated June 12, 1989. Thomas has never resumed operations since June 2, 1989. It is undisputed that Thomas has failed to operate as a dealership for more than seven (7) consecutive business days. ^{2/}

31. Range Rover learned of the sale of the dealership property as a result of the Los Angeles Times article published in January 1988.

32. By letter dated May 23, 1989, Thomas notified Range Rover for the first time that Thomas was required to vacate the premises "within two weeks".

2/ Vehicle Code section 3060 provides in pertinent part:

"Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:

(a) The franchisee and the board have received written notice from the franchisor as follows: ...

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following: ...

(E) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer or by order of the department. ..."

The above language is an indication of the seriousness of such conduct on the part of the franchisee in that such franchisee has only 10 days (as compared to the normal 30 days) to file a protest, and if no protest is filed, the effective date of the termination will be 15 days from the date of receipt of the notice (rather than the normal 60 days).

33. Thomas ceased operations on June 2, 1989, and has not reopened the dealership since that date. From June 2, 1989, to June 12, 1989, (the date of the notice of termination) Thomas failed to conduct customary sales and service operations.

34. Thomas' cessation of business is not excused by section 14.8 of the dealer agreement because the cessation was not due to circumstances beyond the direct control of Thomas. Accordingly, section 12.3.7 of the dealer agreement is fully applicable to the conduct of Thomas. For the same reason, the notice provisions of Vehicle Code section 3060(a)(2)(E) were properly utilized by Range Rover in this matter.

35. Thomas had agreed in early 1988 to reduce the term of its lease. Thus, as of the time of the hearing, Thomas had known for over one year that it would have to move out of its dealership premises. Given this fact, Thomas could have made a decision and taken appropriate action much earlier than it did regarding the relocation of the dealership or the sale of it to a third party.

36. Thomas agreed to amendments of its 10-year lease which shortened its duration by 5 1/2 years. There was no consideration paid to Thomas for these amendments. Thomas' decision to accelerate the lease termination date to June 4, 1989, was for business and financial reasons.

37. Range Rover did not learn of either of the amendments to the lease until after these protest proceedings had begun. Thomas did tell Range Rover in early 1988 that Thomas needed to relocate, however, no formal relocation request was submitted to Range Rover until May 5, 1989. This request, which outlined the dealership's plan to relocate as a stand-alone facility near the Convention Center, was rejected by Range Rover because of deficiencies in the information submitted by Thomas.

38. Range Rover had repeatedly requested information from Thomas about its future dealership plans and had warned Thomas that all proposals for a relocation must be submitted timely.

39. Between May 20 and May 25, 1989, (approximately one week prior to the date that Thomas ceased operations) Thomas negotiated with Downtown Auto Distributors ("Downtown") for the sale of its Cadillac and Range Rover dealerships. Range Rover was never notified by Thomas of these negotiations.

40. On June 7, 1989, Range Rover received a written buy-sell agreement between Thomas and Downtown.

41. Range Rover refused to approve the buy-sell for several reasons, including the following:

- a. The proposed facility already housed the Porsche, Volkswagen, and Audi line-makes. Range Rover did not believe there was sufficient space to add the Range Rover franchise. The showroom could accommodate only five (5) vehicles.
- b. The operations at the proposed location were not making money.
- c. Range Rover preferred to dual the Range Rover franchise with the Mercedes-Benz franchise held by Downtown:

42. On several occasions, Thomas misled Range Rover regarding the dealership's plans to vacate the premises. In March of 1989, Thomas informed Range Rover that the dealership was not closing down. On April 27, 1989, Thomas told Range Rover that the dealership would have 60 to 90 days before it would have to vacate the premises. Neither of these statements was true. For reasons unknown, Thomas gave Range Rover only two (2) weeks notice of Thomas' intention to vacate the premises.

43. Range Rover contacted Mercedes-Benz to see if it would approve of a dual operation of Range Rover and Mercedes-Benz at the Downtown facility. Downtown was advised by Mercedes-Benz that it would not approve a dual arrangement with Range Rover at the Mercedes-Benz facility.

44. All the negotiations between Range Rover and Downtown took place after Thomas vacated the premises on June 4, 1989.

DETERMINATION OF ISSUES

- I. Range Rover established that as of the date of the notice of termination Thomas was not transacting any business. {Section 3061(a)}

- II. Range Rover established that Thomas no longer has any investment or obligations in regard to the performance of its part of the franchise. {Section 3061(b)}

- III. Range Rover established that Thomas' investment in the Range Rover franchise was not permanent. {Section 3061(c)}

- IV. Range Rover established that it would not be injurious to the public welfare to terminate its franchise with Thomas. {Section 3061(d)}

- V. Range Rover established that Thomas does not have adequate vehicle sales and service facilities, equipment, vehicle parts and qualified service personnel to reasonably provide for the needs of the consumers of Range Rover vehicles, and Thomas has not been rendering adequate service to the public. {Section 3061(e)}

- VI. Range Rover failed to establish that Thomas had not, prior its cessation of business, fulfilled the warranty obligations to be performed by it. Range Rover did establish that Thomas is no longer fulfilling the warranty obligations of Range Rover.
{Section 3061(f)}
- VII. Range Rover established that Thomas failed to comply with the terms of the franchise agreement. {Section 3061(g)}
- VIII. Given the facts as they existed not only at the time that Range Rover gave Thomas the notice of termination, but also as they existed at the time of the hearing, these protest proceedings should have been disposed of summarily without the necessity of the full evidentiary hearing. The absence of statutory authority for the Board to summarily rule on such matters prevented this from occurring.

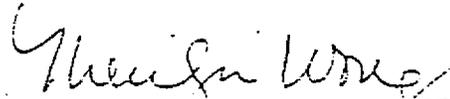
STATEMENT OF DECISION

The following proposed decision is respectfully submitted:

The Protest is overruled. Range Rover shall be permitted to terminate its franchise with Thomas.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing had before me on the above dates and recommend its adoption as the decision of the New Motor Vehicle Board.

DATED: November 15, 1989



MERILYN WONG
Administrative Law Judge
New Motor Vehicle Board