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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
NOVATO TOYOTA, INC.,)
Franchisee,) Protest No. PR-13-75
vs.) N-5860
TOYOTA MOTOR DISTRIBUTORS, INC.,) FILED: July 10, 1975
Franchisor.)

DECISION

On or about December 9, 1974, Novato Toyota, Inc. ("Franchisee"), received a letter dated December 5, 1974, from Toyota Motor Distributors, Inc. ("Franchisor"), entitled, "Subject" Notice of Intent to Discontinue Existing Dealer Point." This letter, in essence, informed the franchisee that the six-year sales and service agreement and its renewal for another six years thereafter would be honored by the franchisor but if there was dissolution of the franchisee corporation or any change in its present management or ownership, franchisor would discontinue the dealer point and that franchisor would not replace franchisee or enter into any new sales or service agreement in Novato upon the termination of franchisee as a dealer.

Novato Toyota thereafter filed a protest pursuant to the provisions of Vehicle Code Section 3060^{1/} and, in accordance with Vehicle Code Section 3066, this board designated a hearing officer to hear the evidence relating to the protest. The hearing officer submitted his proposed decision to this board on April 16, 1975, recommending that the letter of Toyota Motor Distributors, Inc., dated December 5, 1974, and addressed to Novato Toyota, Inc., is a nullity and of no force and effect upon the existing franchise agreement between the parties.

The board, in adopting the proposed decision of the hearing officer, modified it in that it makes further determinations of issues and an additional order as is set forth below.

The board adopts the following findings of the hearing officer:

"I

Novato Toyota, Inc. is a licensed new car dealer with license number 718 and with a dealership location at 7505 Redwood Highway, Novato, California 94947.

"II

Novato Toyota, Inc. is a franchisee under a Toyota Dealer Sales and Service Agreement with Toyota Motor Distributors, Inc., the most recent renewal franchise being that of November 4, 1974.

1/ All references, unless otherwise noted, are to the California Vehicle Code.

"III

On or about December 9, 1974, Novato Toyota, Inc. received a letter dated December 5, 1974, from Toyota Motor Distributors, Inc. entitled 'Subject: Notice of Intent to Discontinue Existing Dealer Point.' A copy of said letter is attached to the Protest as Exhibit 'A' and by this reference incorporated herein. It also appears as Exhibit 'C'. In essence, this letter informed franchisee that the 6-year Sales and Service Agreement and its renewal for another six years thereafter would be honored by franchisor but if there was dissolution of franchisee corporation or any change in its present management or ownership, franchisor would discontinue the dealer point and that franchisor would not replace franchisee or enter into any new sales or service agreement in Novato upon the termination of franchisee as a dealer. A copy of this letter was never sent by franchisor to the New Motor Vehicle Board.

"IV

The Toyota Dealer Sales and Service Agreement of November 4, 1974, provides in Paragraphs III and IV thereof, that the ownership, officers and management of Novato Toyota, Inc. may be changed with the prior written approval of Toyota Motor Distributors, Inc. which approval shall not be unreasonably withheld. Franchisee claims that the letter of December 5, 1974, makes a change in the franchise agreement which substantially affects its investment in that the franchisor has taken the position that it will withhold approval of

any change in management or ownership and will not approve any purchaser of the business.

"V

Prior to the hearing, franchisee petitioned the Board directly asking the Board to declare the letter of December 5, 1974, a nullity and of no force and effect for the reason that the franchisor had not sent a copy to the Board as required by Vehicle Code Section 3060. On March 12, 1975, the Board considered the petition and concluded that it was a proper subject to be considered in the normal course of hearing proceedings.

"VI

Prior to the instant hearing, franchisee made a motion to the Hearing Officer that the proceedings be bifurcated, that is that the Hearing Officer hear the matter only on the issue as to whether or not franchisor had complied with the requirements of Vehicle Code Section 3060 in giving the Board 60 days prior notice by sending to the Board a copy of the December 5, 1974, letter sent to franchisee. After consultation with the attorney for franchisor, the Hearing Officer ordered that the hearing be bifurcated and that the only matter to be considered would be the question whether or not the failure of the franchisor to notify the Board as required by Vehicle Code Section 3060 was jurisdictional and thereafter to propose a decision to the Board resolving that question without considering the question of good cause under Vehicle Code Section 3061.

"VII

The evidence established that franchisor did not send a copy of the December 5, 1974, letter to the Board.

"VIII

The evidence establishes that the letter of December 5, 1974, modifies the franchise. By the terms of the letter, franchisee is now precluded from selling the franchise as an existing business or making any change in ownership or management. In contrast, the existing franchise agreement would permit these changes to be made, subject to franchisor's approval which would not be unreasonably withheld. The letter, in practical effect, eliminates the words found in paragraphs III and IV of the franchise agreement: "Such approval shall not be unreasonably withheld."

"IX

This modification of the existing franchises would substantially affect the franchisee's investment. Franchisee purchased the existing dealership in 1967, and since 1968 has operated an exclusive dealership selling only Toyotas. He estimates the present net worth of the business as being approximately \$100,000 and that the goodwill of the business is estimated at something in excess of \$50,000. By goodwill, franchisee means the value of selling an existing business as opposed to the value of a sale of the assets of the business.

"X

The franchisor takes the position that they are not required by law to notify the Board on the theory that they have not, at the present time, made any change in the terms of the existing franchise. Franchisor has conducted a market study which has indicated to them that they should eliminate Novato as a dealer point. Rather than waiting until such time as franchisee decided to make any change in ownership or management or desired to sell the dealership, franchisor felt it was more appropriate to inform franchisee of their future intentions now, as a matter of ethical business practice. Franchisor's position is not well taken. The letter of December 5, 1974, was made effective on its date and does, as found in Finding VIII above, modify the terms of the existing franchise. Franchisee is now precluded from ever selling the franchise or of making changes in his management or ownership, no matter whether a potential buyer, new management or new owner is acceptable to franchisor."

Pursuant to the foregoing findings of fact, the Hearing Officer makes and the board adopts the following determinations of the issues presented:

"I

The letter of December 5, 1974, modifies the existing franchise of Novato Toyota, Inc. pursuant to Vehicle Code Section 3060.

"II

The modification of the franchise substantially affects the investment of Novato Toyota, Inc. pursuant to Vehicle Code Section 3060."

"III

The pertinent part of Vehicle Code Section 3060 states: 'The franchise shall not modify...a franchise...if such modification...would substantially affect the franchisee's...investment, unless the franchisor shall have first given the board...notice thereof at least 60 days in advance of such modification...' (underscoring added).

Pursuant to the rules of statutory construction, the requirement to notify the board is mandatory, not directive, and failure to so notify the board makes the attempted modification of the franchise a nullity and of no force and effect.

"IV

No determination of 'good cause' pursuant to Vehicle Code Section 3061 is made herein because of the order bifurcating the issues to be determined at this hearing."

The board, after reviewing the entire matter and, after due deliberation, makes further determination of issues as follows:

V

That both the board and the franchisee shall be given notice as prescribed by Vehicle Code Section 3060.

VI

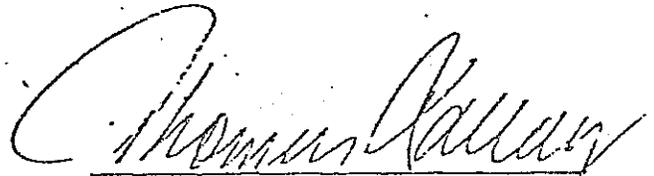
That the failure of the franchisor to give such notice, as required by Vehicle Code Section 3060, is a violation of Chapter 4, Article 1 (Sections 11700 et seq.) of the California Vehicle Code.

The board adopts the proposed order of the hearing officer, to wit:

"The letter of Toyota Motor Distributors, Inc., dated December 5, 1974, and addressed to Novato Toyota, Inc., is a nullity and of no force and effect upon the existing franchise agreement between the parties."

AND, in light of all the findings, the board makes the additional order as follows:

The board, pursuant to the authority of Vehicle Code Section 3050, subsection (c), orders the department, if so advised, to take appropriate action for the violations of the Vehicle Code noted above.



THOMAS KALLAY, Member

The foregoing constitutes the decision of the NEW MOTOR VEHICLE BOARD.

Dated:

7-10-75



ROBERT A. SMITH, President