NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of LAX MACK MID-LINER SALES & SERVICE, INC., Protestant, vs. MACK TRUCKS, INC. Respondent.	**Protest No. PR-1408-94**

DECISION

At its regularly scheduled meeting of August 21, 1997, the Public members of the Board met and considered the administrative record and proposed decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 21st DAY OF AUGUST 1997.

Daniel M. Livingston

DANIEL M. LIVINGSTON
President
New Motor Vehicle Board

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In the Matter of the Protest of LAX MACK MID-LINER SALES & SERVICE, INC., Protestant, vs. MACK TRUCKS, INC. Respondent.	**Protest No. PR-1408-94** **PROPOSED DECISION**

PROCEDURAL BACKGROUND

1. By letter dated April 28, 1994, Mack Trucks, Inc. (hereinafter "Mack") gave notice to LAX Mack Mid-Liner Sales & Service, Inc. (hereinafter "LAX"), pursuant to Vehicle Code section 3060[1], of Mack's intention to terminate the Mack franchise held by LAX. The notice of termination was received by the Board on May 2, 1994.

[1] All statutory references are to the Vehicle Code unless otherwise noted.

2. LAX is a licensed new motor vehicle dealer enfranchised to sell Mack Mid-Liner Trucks. LAX is located at 4201 West Imperial Highway, Inglewood, California.

3. Jack Prince ("Prince") and Irene Kinoshita ("Kinoshita") are the dealer principals of LAX.

4. Mack is a distributor of new motor vehicles in California.

5. LAX filed a protest on May 27, 1994 with the Board, pursuant to § 3060. The Board assigned Protest Number PR-1408-94.

6. A four (4) day hearing was held before Douglas H. Drake, Administrative Law Judge, commencing on April 15, 1997 and ending on April 18, 1997.

7. Protestant was represented by Barry L. Cohen, Esq., Law Offices of Barry L. Cohen, 3800 La Crescenta Boulevard, La Crescenta, California.

8. Respondent was represented by William J. Meeske, Esq. and Gary R. Ignatin, Esq. of Latham and Watkins, 633 West Fifth Street, Suite 4000, Los Angeles, California.

CONTENTIONS OF THE PARTIES

9. Respondent contends that LAX breached the Distributor Agreement by failing to actively promote the sale of Mack products in the Territory[2] by failing to meet the Profit Planning Objective (PPO) requirement of the contract, by failing to provide Mack training to its employees, by failing to pay its account to Mack,

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[2] The Distributor Agreement defines Territory as "the geographical area designated to be the area of the Dealer's Primary Sales and Service Responsibility. . ." In the case of LAX, this is the Los Angeles market area.

by failing to maintain sufficient capital to operate the business, and by failing to purchase essential tools necessary for safe service.

10. Protestant contends that Mack breached the Distributor Agreement by selling its truck financing division thus breaching its promise to assist LAX in purchasing trucks, by failing to provide cooperative advertising, by allowing a factory store to illegally undersell LAX and commit anti-trust violations, by beginning a competing parts service store and by breaching the covenant of good faith and fair dealing, essentially abandoning LAX.

ISSUES PRESENTED

11. Did LAX breach the Distributor Agreement by failing to actively promote the sale of Mack products in the Territory in the following respects:

(a) By failing to sell 48 trucks during the first twelve months of the dealership's existence (7/92 to 6/93) and 53 trucks during the second twelve months of the dealership's existence.

(b) By failing to meet the PPO requirement of the contract.

(c) By failing to provide Mack training to its employees.

(d) By failing to pay its account to Mack.

(e) By failing to maintain sufficient capital to operate the business.

(f) By failing to purchase essential tools necessary for safe service.

12. Did Mack breach the Distributor Agreement in any of the following respects:

(a) By selling its truck financing division (Mack Financial Corporation) and breach its promise to assist LAX in purchasing trucks.

(b) By failing to provide cooperative advertising.

(c) By a Mack wholly owned subsidiary distributorship (factory store) illegally underselling LAX or otherwise commit anti-trust violations.

(d) By Mack beginning a competing parts service within the Los Angeles Market Area.

(e) By breaching the covenant of good faith and fair dealing, essentially abandoning LAX.

13. Section 3066 imposes upon Mack the burden of establishing the existence of good cause to terminate or refuse to continue the franchise of LAX.

14. 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 franchise.

(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 service 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.

FINDINGS OF FACT

a. Findings of Fact relating to whether LAX breached the Distributor Agreement by failing to sell 48 trucks during the first twelve (12) months of the dealership period and 53 trucks during the second twelve (12) months of the dealership period.[3]

15. The Distributor Agreement was executed by the parties on July 24, 1992 and an addendum was also executed by the parties.

16. The Addendum provided that LAX would sell 48 trucks during the first 12 months of the dealership period and 53 trucks during the second 12 months of the dealership period.

17. LAX sold only 8 vehicles during its first 12 months and only 5 during its second 12 months.

b. Findings of Fact relating to whether LAX breached the Distributor Agreement by failing to meet the Profit Planning Objective.

18. The Distributor Agreement provides that LAX would "use its best efforts actively and vigorously to sell Mack Mid-Liner

[3] Findings of fact are grouped in the most logical category and have been considered for each of the good causes factors and "the existing circumstances."

Products, and to promote and develop energetically the potential for the sale of Mack Mid-Liner Products within the Territory."

19. The Distributor Agreement further provided that "the effectiveness of the dealer in these activities may be evaluated by consideration of its performance in meeting the Profit Planning Objectives of [Mack]. Such quantities to be sold shall include a specific number of Mack Mid-Liner vehicles which shall represent the realistic share of the anticipated total market."

20. The PPO is a quota system based on a determination of sales for the industry broken down into regions and districts and historical sales.

21. The PPO provides that LAX would sell 30 trucks during its first whole year of 1993 and 15 for 1994.

22. LAX sold only 7 trucks during 1993 and only 4 trucks by the end during 1994.

c. <u>Findings of Fact relating to whether LAX breached the Distributor Agreement by failing to provide training to its employees.</u>

23. The addendum to the dealership agreement provides that LAX would

> "In addition, a percentage of the Dealer's Vehicle Service Staff equal to the percentage of Mack Mid-Liner Vehicles in the Territory to the population of Similar Vehicles in the Territory shall have at least one year experience in servicing Mack Mid-Liner Vehicles, and shall have completed a Mack service training seminar approved by the Company, but in no event shall there be less than one such experienced or trained mechanic.

24. During the period July 1992 to April 17, 1997, LAX sent only one employee for Mack certified training, Hector Madena, during 1994, after the Notice of Termination.

25. During that period, LAX had one employee, Kenny

Wakefield, a former employee of Mack who had training. LAX always had at least one employee who had Mack certified training.

d. <u>Findings of Fact relating to whether LAX failed to pay its account to Mack Truck</u>

26. The Distributor Agreement provided that LAX would pay its account to Mack Truck.

27. The account was paid timely during its first two months.

28. Beginning on or about October, 1992, LAX failed to pay its account current.

29. By February, 1993, LAX was behind in its account to Mack by $35,823.88.

30. In or around February, 1993, Mack placed LAX on a COD on this account.

31. In about February, 1993, Mack and LAX through its parts and service manager agreed that LAX would pay its arrearages at the rate of $3,000 per month.

32. LAX only paid two $3,000 payments before missing one month's payment; it then made three more $3,000 payments and then failed to make any more payments on the account after August 31, 1993. As of April 30, 1994, $24,677.71 was owing.

e. <u>Findings of Fact relating to whether LAX breached the Distributor Agreement by failing to buy essential tools.</u>

33. The Distributor Agreement provided that LAX would "purchase and use such special tools as may be necessary to render economical and efficient service."

34. These special tools are designed to work on things that are unique to the Mack truck. Mack does not manufacture these tools; Kent-Moore, an independent manufacturer, manufactures and

sells Mack special tools.

35. LAX knew that it would need to have tools that Mack considered essential.

36. Mack, through its employee Carl Stromstedt, gave LAX a list of tools that Mack considered essential.

37. LAX represented to Mack that it had in fact bought some of the essential tools. LAX represented to Mack that LAX had sent a purchase order to the tool provider, Kent-Moore, for approximately 1/2 the tools that Mack considered essential. In fact, no tools were ever sent to LAX from the tool provider.

38. The tools were essential to Mack Trucks because the primary reason for having them is proper repair procedure and safety. The tools are necessary for prompt and efficient repair. Having them is profitable for the dealer because it eliminates service returns and slow repairs and for the safety of the public. Mack is concerned about the tremendous liability issue when it came to the safety of the general public and the motoring public and took the essential tool program very seriously and insisted upon 100% compliance.

39. During the period July 1992 through April 17, 1997, LAX had purchased only 17 of the 80 tools considered essential for the safe repair of Mack Trucks.

40. LAX was the only dealer (out of approximately 220) preventing Mack from having 100% participation in the essential tools program.

f. <u>Findings of Fact relating to whether LAX breached the Distributor Agreement by failing to maintain sufficient capital to operate the franchise.</u>

41. The two principals and owners of LAX, Kinoshita and

Prince, represented to Mack that the initial capitalization of LAX would be $100,000 cash in the bank.

42. Mack believed that the initial capitalization was $100,000 cash.

43. Mack relied on the representation of a $100,000 cash initial capitalization in combination with the representation that Kinoshita had 25 years experience in the motor vehicle business and Prince had experience in the motor vehicle business as well as the fact that Prince Truck Center was a going concern that had experience as a Mitsubishi truck dealer and an Iveco truck dealer. These facts were sufficient for Mack to approve the dealership agreement with only $100,000 in cash as an initial capitalization.

44. The initial pro forma showed a ratio of net debt to net assets of zero. The standard in Mack's business is .87 or less and for a start-up organization, nothing in excess of 4 to 1.

45. In truth, LAX was not capitalized initially with $100,000 cash, but with used trucks from Prince and some other assets such as tools and parts inventory worth approximately $120,000. Prince left it to the accountants, in whom he entrusted the financial accounting of LAX to determine the details. The accountants reflected the capitalization at $108,500. However, by the end of 1993, the capital, as reported by the accountants, had dropped to $100,000. Prince could not explain this drop. While the LAX dealership is now profitable, Prince could not say whether it was making $1.00 per year profit or something else, and could not say whether it still had a negative $58,000 in retained earnings.

46. LAX had no cash when it began operations and thereafter had cash only from the sale of the used trucks to operate until the

sale of the first new Mack truck.

47. LAX had insufficient cash to pay its vendors, Kent-Moore for the essential tools and Mack for its account. It stopped paying all vendors. It had no money to pay the $3,000 a month payment on its past due account. Prince's intent was to pay Mack when the cash flow improved. Mack was never paid and the account has now grown to $$24,677.71 as of April 30, 1994 and no payment has been made since then.

48. Mack Financial Corporation, LAX's flooring company, had two occasions when LAX was slow to pay by about 10 days. LAX did pay on demand. As a result, Mack Financial became anxious that LAX would soon be on a SOT (Sold out of Trust) basis, meaning that the funds advanced for the vehicle are converted and put into an account where it should not be put.

49. On April 30, 1993, the net debt to net assets ratio had increased to 1.1, far above the .87 optimum.

50. LAX made only one tool purchase from Kent-Moore of essential tools prior to May 21, 1993 and failed to pay for them so that Kent-Moore placed LAX on a COD basis.

51. Approximately July of 1993, Kinoshita placed a mortgage on her house and infused $60,000 of additional capital.

52. The financial statement of July 31, 1993, showed no such capital contribution, therefore the addition of capital was after July, 1993.

53. The dealer net worth as of the date of formation was approximately $120,000 due to the capitalization with 12-15 used trucks by Prince.

54. The financial statements show the following net worth,

capital stock and retained earnings:

Date	Net Worth	Capital Stock	Retained Earnings
12/31/92	62,435		
4/30/93	57,798	108,500	(49,244)
5/31/93	59,793	108,500	(56,503)
6/30/93	65,039	108,500	(56,503)
7/31/93	70,636	108,500	(46,503)

g. <u>Findings of Fact relating to whether Mack's sale of Mack Financial breached a promise to assist LAX in purchasing trucks.</u>

55. There was no provision in the dealership agreement to keep Mack Financial as a wholly owned subsidiary nor to assist LAX in purchasing trucks.

56. Mack, when it sold Mack Financial to Associates Commercial, obtained a promise from Associates Commercial to provide similar service and no cessation of business to Mack's dealers. The Associates provided similar terms and had many more locations from which to service customers.

57. LAX was on a COD basis with Mack Financial when Mack sold Mack Financial to Associates Commercial on September 1, 1993.

h. <u>Findings of Fact relating to whether Mack failed to provide cooperative advertising.</u>

58. The Distributor Agreement provided that Mack would "agree to contribute in a Cooperative Advertising Fund in the amounts and under the conditions set forth in the Discount Schedule attached hereto." No Discount Schedule was attached to the Distributor Agreement in evidence but one was attached to the original contract.

59. Mack had not had cooperative advertising since 1985 due

to Mack Dealer's Council's voting as a group to cease cooperative advertising.

60. Mack did provide assistance on one or two occasions for advertising during LAX's start up period. This was not cooperative advertising.

61. The factory stores' advertising was out of local factory store's operating budgets, not paid for by Mack.

i. <u>Findings of Fact relating to whether Mack's factory stores illegally undersold LAX.</u>

62. The nearest factory stores are in Anaheim and Ontario and thus outside the Relevant Market Area of 10 miles.

63. Mack sells identical trucks for identical prices to all dealers, whether factory stores or dealerships.

64. There is a 2% holdback on each invoice. The factory stores take the 2% immediately on invoice. The Mack Dealers Council voted to have the 2% holdback paid to the dealers at year end. Mack will in fact pay the 2% discount on demand by any distributor. The holdback will be paid in cash to the distributor unless it is in arrears on its account, and then it will be paid on the account.

65. LAX made a demand for the 2% holdback to be paid on its account.

66. Mack paid the 2% holdback as requested.

j. <u>Findings of Fact relating to whether Mack began a competing parts service within the Los Angeles Market Area.</u>

67. A competing parts and service center, Carter, was established, but outside the Los Angeles Market Area.

68. Prices of parts to a parts and service center such as

Carter are 15-18% greater than to a distributor such as LAX.

69. Carter is an independent company and not owned by Mack.

70. Carter did not stay in business more than a year.

k. <u>Findings of Fact relating to whether Mack breached the contract, by abandoning LAX once the Notice of Termination was sent.</u>

71. The principal of LAX, Kinoshita, routinely did not get mail that was in fact sent to her at LAX by Mack. For example, the April 8, 1993 letter, the April 16, 1992 memo, and even the termination letter were not received by her.

72. Her testimony that there were no reviews after the Notice of Termination was untrue.

73. That testimony was as follows:

Q Prior to the notice of termination, did anyone from Mack offer to meet and discuss the problems that LAX Mack and Mack were having?
A No.
Q At the time that you were -- at the time that you received your notice of termination, had you been receiving regular visits from Mack personnel?
A Before the termination?
Q Correct.
A Yes. They were coming to visit us.
Q How often would they be coming to visit?
A Every other month.
Q And would that be somebody in Mack representing Mack sales?
A Sales, no. I would probably say Carl Stromstedt?
Q Yes.
A He would come by.
Q And he represents Mack service.
A Yes.
Q And how often would he come by?
A There are times when he was on his way going to Anaheim, he would come by. He would call me a day before. He said he was going to see Anaheim, so he would come by.
Q And would anybody from Mack parts -- from the Mack Parts Department --
A I --
Q -- come -- come by and see you on a regular basis?
A I very rarely saw people coming from Parts from Mack -- maybe every six months. I'm not quite sure.
Q Subsequent to your notice of termination --
A Uh-huh.

Q -- have Mack company officials come to provide any service or assistance?
A Company officials from Allentown?
Q Or --
A Any --
Q -- your regular -- your regular parts supplier?
A No.
Q Your service -- the service supervisor?
A Not that often.
Q When you say "not that often," how often have -- have these people been showing up after the notice of termination?
A Oh, after the notice of termination, I haven't seen anyone. I think maybe once or twice. That -- that's about it. Right after that, once or twice. And then from then on, no one. I haven't seen anyone.

74. There were regular routine operational reviews in 1995 and 1996, the same as all other distributors.

75. Likewise, the following testimony by Kinoshita was false:

Q At one point in time, LAX Mack fell seriously delinquent in its parts order payments.
A Uh-huh.
Q Can you tell me the circumstances?
A We -- well, we were ordering $8,000 a month at the time. And we were paying every month. And then for -- at -- I think it was the third month or fourth month, Kenny Wakefield, for some reason unbeknownst to me, ordered $28,000 worth of parts.

76. The truth is that neither Kenny Wakefield nor LAX ever ordered parts in the amount of $28,000 in any one month.

77. Mack omitted several dealers, including LAX, from its distributor handbook in 1995. An employee was reprimanded. The error was corrected for the 1996 handbook.

78. LAX received notices routinely.

79. LAX was treated no differently from other dealers after the Notice of Termination.

80. LAX did not like the Mack District Sales Manager, Murray Cox, and requested he not come around. An agreement was reached where Mr. Cox would provide assistance only when called by LAX. Instead, a representative from Mack's national headquarters in

Allentown, Pennsylvania, provided assistance.

81. Murray Cox did provide computer training on warranty claims. An employee of LAX did in fact attend computer training and received a completion certificate from Mack after the Notice of Termination, on June 20, 1996.

1. Existing Circumstances mandated to be considered by Vehicle Code Section 3061[4]

(1) Amount of business transacted by the franchisee as compared to the business available to the franchisee.

82. In the Los Angeles Market Area assigned by LAX, the following number of Mack Mid-Liner trucks were registered according to Polk data:

Class 6 Trucks:

Year	Industry	Mack	Percentage
1987	1881	74	3.9
1988	2814	144	5.1
1989	2900	653	22.5
1990	2557	62	2.4
1991	2410	79	3.2

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[4] Findings of fact stated elsewhere are incorporated in these factors where appropriate but not duplicated here to avoid redundancy.

Class 7 Trucks:

Year	Industry	Mack	Percentage
1987	188	7	3.7
1988	281	14	4.9
1989	290	65	22.4
1990	255	6	2.3
1991	241	8	3.3

83. While the number of trucks projected for sale by LAX (48 and 53, for the first two years, respectively) was optimistic, it was possible and equalled approximately 1/2 of the registrations in the Market Area for the prior years. In 1991, the year before the Distributor Agreement went into effect, Mack sold 79 trucks in the Los Angeles market area that LAX was taking over, so that LAX should have been able to sell 36 (less than 1/2) in that area the following year. Those numbers were never met.

84. Mack uses a PPO to determine a realistic number of vehicles for a dealer to sell in any given year. It is determined at the top by using a various number of national forecasts and econometrics models, including those of the Whorton Business School and Chase Econometrics to determine what the national sales will be for the industry, and by using historical data, bring the number down into the regions and districts. At the same time, Mack has its District Managers confer with dealers to come up with a number of trucks representative of the particular district's historical and projected achievements to obtain, hopefully, a match.

85. The PPO for LAX of 30 in 1993 and 15 in 1994 was even more conservative and these numbers were never met.

86. LAX sold only 2 during 1992, 7 during 1993 and 4 during

1994.

87. LAX is in the largest market for Mid-Liner trucks in the Pacific District, if not the nation, perhaps only New York City being larger.

88. In 1993, in the Pacific District, LAX sold only 23.3% of its quota, compared to 40% to 100% for the other dealers:

Dealer	Quota	Sales	Percentage
Phoenix	8	5	62.5
Ventura	4	4	100.0
Tucson	5	2	40.0
Sacramento	5	5	100.0
Stockton	2	2	100.0
San Diego	2	2	100.0
LAX	30	7	23.3

(2) Investment necessarily made and obligations incurred by the franchisee to perform the franchise.

89. The last financial statement showed negative retained new earnings of $56,503, a net worth of only $70,636, and a loss of nearly $40,000 since its inception.

90. At the time of termination, LAX was unable to pay even $3,000 per month on its past due account to Mack; it was on COD with Mack, the flooring company, and Kent-Moore. There was no evidence produced to show that this has ever changed.

(3) Permanency of the Investment.

91. The facts under the prior paragraph and the findings on lack of adequate capitalization are incorporated herein.

92. Prior to LAX's obtaining the Mack franchise, LAX was known as Prince Truck Center and was in the business of selling

used trucks.

93. During a 1994 operational review, the following analysis of sales mix in the Western Region occurred, showing that LAX was still predominately a used truck dealer:

	LAX	Western Region
New Trucks	16.2	39.2
Used Trucks	65.5	16.4
Service/Parts	18.3	44.4
	100%	100%

94. As of March 31, 1997, LAX's past due account with Mack stood at $40,382.34.

(4) Whether it would be injurious or beneficial to the public welfare to terminate.

95. The dealer principal, Kinoshita, responsible for the day to day operation of the LAX franchise has skills in used truck sales, but there was no evidence that she has any skills in the operations of the LAX franchise and she received no training from Prince in service, parts, financial statements, and general dealer operations. She knew nothing about the Mack Truck business in the Los Angeles County area.

96. Kinoshita delegated authority for parts, tools, and service to her parts and service manager.

97. There was a lack of communication between Kinoshita and her employees. For example, Kenny Wakefield, the parts manager, ordered $8,000 in parts on several occasions without checking with Kinoshita. She was upset when her employee, Mike Altman, negotiated a deal with Mack to pay an immediate balance due of $35,000 at $3,000 a month.

98. All of the following are indicative of Kinoshita's lack

of business skills: (1) she failed to investigate whether the parts billed to her on the Mack account were delivered; (2) she gave her customers credit for 30 days who did not pay; (3) she failed to pay vendors, such as Kent-Moore, as the bills became due; (4) she failed to purchase tools essential for the efficient and safe repair of trucks ; (5) there has been a serious turnover of personnel; (6) she was unable to capitalize the franchise sufficiently to operate it; and (7) she does not know what tools are essential for the safe and efficient repair of trucks.

99. Customers who do buy trucks from LAX do not return for service.

100. Prince gave Kinoshita 25% of the new corporation, LAX, because she was a good long-term employee. He gave her no training in service, parts, financial statements, or dealer operations. Prince attempted to surround her with competent people instead.

101. In the event of termination, adequate sales and service facilities are available at nearby Anaheim, Chatsworth and Ontario, where most of the warranty service of LAX Mack Trucks are being handled anyway.

(5) <u>Whether the franchisee has adequate sales and service facilities, equipment, vehicle parts and qualified service personnel and is rendering adequate services to the public.</u>

102. The sales and service facilities are adequate.

103. LAX has failed to purchase adequate tools (equipment) to provide adequate services to the public, having only 17 of 80 essential tools. The remainder of the basic tools are insufficient to provide adequate Mack Truck service.

104. The pro forma provided for approximately $20,000 a month

in parts purchases. Monthly purchases of $20,000 to $25,000 in parts is a reasonable amount of purchases to get a dealership started. LAX only purchased approximately $3,000 the first month in parts, $8,600 the second month, and $7,000 the third month. When the parts manager, Kenny Wakefield, ordered more per month LAX attempted to send the parts back.

105. In the nearly five years since LAX has been operating, it has sent only 1 technician to training at Mack.

106. LAX's service business was extremely low -- in early 1993, it was only $2,300 over nearly two months with two mechanics. An average dealer will do service business of $5,000-$7,000 per mechanic per month.

107. A commonly used number in the vehicle business to measure the viability of a dealer is a figure called an "absorption ratio," which measures the ability of its parts and service business to pay for all of the expenses of the dealership exclusive of commissions.

108. The goal of a viable dealership is an absorption ratio of 100 percent. LAX's absorption ratio ranged from approximately 22 to 45 percent.

(6) <u>Whether the franchisee fails to fulfill the warranty obligations of the franchisor.</u>

109. There were 42 warranty claims on trucks sold by LAX. Seven of the claims were in transit claims between the port and LAX. Of the 35 remaining warranty claims, 25 were performed by the factory store in Anaheim. Only 4 were handled by LAX.

110. LAX has performed only 9 warranty claims since its inception on trucks sold by any dealer.

111. During the 21 months LAX operated prior to the Notice of Termination, LAX handled only two warranty claims. The average low-end shop in the Western region would file 10-12 claims per month. A high-end shop like Chicago will file 600-800 claims per month.

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

112. The facts relating to the breach of the franchise agreement discussed above are incorporated herein.

DETERMINATION OF ISSUES

113. LAX breached the contract in the following respects:

(a) It failed to sell 48 trucks in its first 12 months and 53 trucks in its second 12 months.

(b) It failed to meet its Projected Planning Objective of 30 trucks in 1993 and 15 trucks in 1994.

(c) It failed to provide training to its employees at Mack.

(d) It failed to pay its account to Mack.

(e) It failed to purchase tools essential to the safe and efficient repair of Mack Trucks.

(f) It failed to maintain sufficient capital to operate the franchise.

114. Mack Trucks did not breach the contract in the following respects:

(a) It did not promise to assist LAX in purchasing trucks. Nevertheless, Mack did assist LAX as well as all other of its dealers in requiring similar terms from the purchaser of Mack Financial.

(b) It did not promise to provide cooperative advertising. Nevertheless, Mack did pay for two months advertising for LAX.

(c) It did not illegally undersell LAX through its factory stores.

(d) It did not begin a competing parts service within the trade area.

(e) It did not abandon LAX but treated it identically with its other dealers.

115. The conclusions on the factors to be considered under section 3061 are as follows:

(a) LAX is not transacting an adequate amount of business as compared to the business available to it.

(b) LAX made an insufficient investment and is unable to perform its obligations necessary to perform the franchise.

(c) LAX has only a small net worth, that can be recouped by sale of its remaining assets and thus there is no permanent investment.

(d) It would be injurious to the public welfare for the franchise to continue.

(e) LAX has an adequate motor vehicle sales and service facility.

(f) LAX has inadequate equipment to render adequate service to the public.

(g) LAX has inadequate parts to render adequate service to the public.

(h) LAX had inadequate service personnel to render adequate service to the public.

(i) LAX is not rendering adequate service to the public.

(j) LAX fails to fulfill warranty obligations of Mack.

(k) LAX has failed to comply with the franchise agreement as noted above in severe and essential ways.

PROPOSED DECISION

Mack Trucks, Inc, shall be allowed to terminate the franchise of LAX. The protest is overruled.

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

DATED: August 14, 1997

By ______________________
DOUGLAS H. DRAKE
Administrative Law Judge