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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

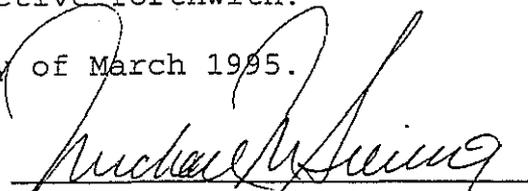
In the matter of the Protest of)
GREENWOOD PONTIAC, INC.,) Protest No. PR-1418-94
Protestant,)
vs.)
GENERAL MOTORS CORPORATION,)
PONTIAC MTOOR DIVISION, AND)
GMC TRUCK DIVISION,)
Respondents.)
_____)

DECISION

At its regularly scheduled meeting of March 21, 1995, 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 March 1995.


MICHAEL M. SIEVING
Administrative Law Judge/
Assistant Executive Secretary
New Motor Vehicle Board

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11 In the Matter of the Protest of)
12 GREENWOOD PONTIAC, INC.,) **Protest No. PR-1418-94**
13 Protestant,)
14 vs.)
15 **PROPOSED DECISION**
16 GENERAL MOTORS CORPORATION,)
17 PONTIAC MOTOR DIVISION, AND)
18 GMC TRUCK DIVISION,)
Respondents.)

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1 to retail buyers, they were not eligible for dealer incentive payments.¹
2 Mr. Fenton refused to acknowledge the audit. Subsequently, GM debited
3 Greenwood's dealer account in the amount of \$81,644.72, and Greenwood
4 initiated an internal appeal to GM's management. Management upheld the
5 audit.

6 ISSUES PRESENTED

7 On September 26, 1993, the Governor signed into law Assembly Bill 1032
8 adding new section 3065.1 to the Vehicle Code. This section establishes
9 new statutory rules for processing and auditing claims under the terms of
10 franchisor incentive programs. Paragraph (b) of the section allows
11 franchisors to audit franchisee incentive records for the prior eighteen
12 month period. The section also provides that "incentive program
13 compensation shall not be disapproved except for good cause, such as
14 ineligibility under the terms of the incentive program, lack of material
15 documentation or fraud." The principle issue presented in this protest is
16 whether GM had good cause for disallowing the subject incentives.

17 GM contends that its Dealer Sales and Service Agreement contains a
18 general prohibition against new vehicle exports by any dealer, and that its
19 documented policies for allowance and incentive programs do not allow
20 incentive payments for vehicles sold for export or resale. In that 68 of
21 the subject vehicles were sold for resale and 19 were eventually exported,
22 it is GM's position that none were eligible for incentive payments and, for
23 that reason, good cause exists for the disapproval. GM also contends that
24 the stolen vehicles were not sold, and therefore were also ineligible.

25
26 ¹ Portions of the oral testimony of Mr. Latsko referred to three
27 rather than two stolen vehicles, but Exhibit R-3, the audit report
28 identifies only two vehicles as insurance payoffs. This discrepancy was
not resolved during the hearing. Greenwood declined to contest the
disallowances for three Pontiac vehicles and does not include them in
the present action.

1 Protestant does not contend that the subject vehicles were not sold
2 for resale, or not exported as alleged. Protestant claims instead that
3 it did not have a current copy of the GM Truck Dealer Incentive Allowance
4 Program Manual and that it interpreted the incentive programs differently.
5 Protestant thought of the truck upfitter as being in the nature of an
6 invoice price reduction and the model close-out program as an inventory
7 value adjustment. Protestant also believes that these programs are not
8 "market driven incentives" and are therefore not covered by the GM rule
9 excluding non-retail sales from the incentives program.

10 In briefs filed before and after the hearing, Protestant contended
11 that the chargebacks constitute an unlawful contractual penalty against
12 Greenwood. Respondent argued in opposition that the chargebacks were not
13 penalties but merely debits for payments it had already advanced which
14 Respondent applied upon learning that Protestant had not performed under
15 the terms of the incentive and allowance program.

16 FINDINGS OF FACT

17 Respondent established that its "Administrative Manual for GM Truck
18 Dealer Allowance and Incentive Programs" and program guidelines set forth
19 the rules and requirements for dealer participation. The manual contained
20 the admonishment that all dealers would be responsible for the contents of
21 the document and recommended that dealers review it personally and ensure
22 that it be understood by employees. Sections 9 and 10 of the manual
23 contained general guidelines and definitions which were applicable to all
24 GM incentive and allowance programs.

25 Section 9 provided that "Vehicles delivered to purchasers for domestic
26 resale purposes or export will not be eligible vehicles under any allowance
27 or incentive program". A substantially identical policy had been included
28 in the manual since at least 1987.

1 Section 10 defined the term "Hold for Resale Vehicles" as a..."sales
2 transaction involving a purchaser who is not buying for their own use, but
3 who is buying with the intention of reselling the vehicle to an ultimate
4 purchaser. Units involved in these type [sic] transactions are not
5 eligible for GM incentives and/or allowance payments." Respondent
6 established that it reserved the contractual right to audit Protestant's
7 books and records and to charge-back any improperly awarded amounts.

8 GM established that it periodically issued bulletins to its dealers
9 containing guidelines for specific incentives including the upfitter, model
10 year-end and "Bucks for Trucks" programs. These bulletins regularly and
11 specifically incorporated the provisions of sections 9 and 10 of the
12 incentives and allowances manual.

13 Respondent established that the specific program guidelines were
14 distributed to all dealers, including Protestant via a computerized Dealer
15 Communication System which advised dealers of program changes.

16 Respondent established that Protestant's sales files related to the
17 contested disallowances contained documents such as applications for new
18 vehicle registration and purchase contracts marked "hold for resale".
19 These documents showed that sales taxes and registration fees were not
20 collected at the time of sale, further indicating that the vehicles had
21 been sold for resale purposes.

22 Respondent established that it had verified that 19 of the subject
23 vehicles had been exported from the United States by way of vehicle export
24 data purchased by GM from the Journal of Commerce.²

25 Respondent failed to prove that the two reportedly stolen vehicles
26 ineligible. The vehicle identified as VIN 1GKGC26N5PJ was shown to have

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28 ²Evidence of exporting was admitted over Protestant's objection as
additional proof that the subject vehicles were in fact sold for resale.

1 been stolen on September 10, 1993, after the date on which the vehicle had
2 automatically earned a model closeout award. No date was established for
3 the other vehicle. Under the provisions of the Model Close Out Program,
4 an award would be made after a designated date whether the vehicle was sold
5 or not. GM did not establish whether the vehicles were stolen before they
6 became eligible. Although GM clearly intended its model close out program
7 to stimulate sales, it's rules did not specifically address this situation.

8 Protestant failed to prove that whether or not the upfitter allowance
9 was a "price adjustment" it was not subject to the requirements of the
10 incentives and allowances program.

11 Protestant failed to prove that whether or not the model year-end
12 allowance is a "market driven incentive" it was not subject to the
13 requirements of the incentives and allowances program.³

14 Protestant failed to establish that the GM Dealer Sales and Service
15 Agreement and associated incentives and allowances policies contained an
16 express liquidated damages clause.

17 Protestant failed to establish that the incentive and allowance
18 chargebacks were intended as a penalty to ensure that Protestant sold cars
19 to retail customers, and were, therefore, unlawful forfeitures.

20 21 DETERMINATION OF THE ISSUES

22 Based on the evidence presented and the findings herein, the disputed
23 chargebacks for 68 of the vehicles involved vehicles sold for resale a were
24 not eligible for incentives and allowances under the upfitter, model year-

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26 _____
27 ³The terms "price reduction" and "market driven incentive" are not
28 used in the GM manual, but are terms originating from Protestant.
Regardless of how the upfitter, model year-end and Bucks for Trucks
might be characterized, the fact that these programs were subject to the
restriction against sales for resale was conclusively shown.

1 end and Trucks for Bucks programs. Ineligibility is good cause for the
2 disapproval of an incentive claim pursuant to Vehicle Code section 3065.1.
3 GM failed to show that the stolen vehicles were ineligible at the time the
4 year-end allowances were paid.

5 Where Protestant's understanding of the incentives and allowances
6 programs differed from the express and unambiguous written provisions of
7 the GM's manual and guidelines, the latter prevails. To the extent that
8 Protestant elected to proceed upon a course directed by its own unilateral
9 interpretation of the rules of the program, Protestant necessarily assumed
10 the risk that the incentives would be disallowed.

11 The charge-backs were neither liquidated damages nor invalid
12 contractual penalties. A liquidated damages clause must expressly state
13 the parties intent to stipulate to an estimate of anticipated damages (ABI
14 Inc., v. City of Los Angeles, 53 Cal. App. 3d 669 (1984)). The audit and
15 disallowance clauses cited by Protestant did not penalize Protestant for
16 selling to non-retail customers. Rather, the clause was meant to allow GM
17 to recover payments already claimed and awarded to Protestant when those
18 were shown to have been made improperly. As such, the incentive program
19 did not contain an invalid contract penalty.

20 **PROPOSED ORDER**

21 Good cause having been shown for the incentive and allowance
22 disapprovals for those vehicles which were sold for resale, the protest is
23 hereby overruled. Respondent shall be allowed to recover these disallowed
24 payments on and after the thirty-first day from the day on which this order
25 becomes effective.

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1 Good cause was not shown as to those vehicles which were stolen, thus,
2 as to these vehicles, the protest shall be sustained.

3
4 I hereby submit the foregoing which
5 constitutes my proposed decision in the
6 above entitled matter, as a result of
7 a hearing held before me on the above
8 date and recommend adoption of this
9 proposed decision as the decision of the
10 New Motor Vehicle Board.

11 DATED: March 14, 1995

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13 NEW MOTOR VEHICLE BOARD

14 By Kenneth B. Wilson
15 KENNETH B. WILSON
16 Administrative Law Judge
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27 Frank Zolin, Director, DMV
28 Mario Balbiani, Program Manager,
Occupational Licensing, DMV