

NEW MOTOR VEHICLE BOARD  
1507 - 21st Street, Suite 330  
Sacramento, California 95814  
Telephone: (916) 445-2080

STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of )  
CORNING TRUCK & RADIATOR SERVICE, )  
INC., ) Protest No. PR-1765-01  
Protestant, )  
vs. )  
INTERNATIONAL TRUCK & ENGINE )  
CORPORATION, )  
Respondent. )

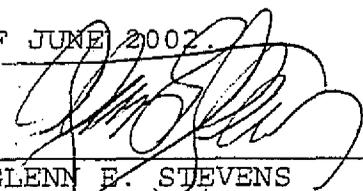
---

DECISION

At its regularly scheduled meeting of June 6, 2002, 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 6<sup>th</sup> DAY OF JUNE 2002.

  
\_\_\_\_\_  
GLENN E. STEVENS  
Vice President  
New Motor Vehicle Board

1 NEW MOTOR VEHICLE BOARD  
1507 - 21st Street, Suite 330  
2 Sacramento, California 95814  
Telephone: (916) 445-2080  
3  
4  
5  
6  
7

8 STATE OF CALIFORNIA  
9 NEW MOTOR VEHICLE BOARD  
10

11 In the Matter of the Protest of )  
12 CORNING TRUCK & RADIATOR SERVICE, )  
INC., ) Protest No. PR-1765-01  
13 Protestant, )  
14 vs. ) PROPOSED DECISION  
15 INTERNATIONAL TRUCK & ENGINE )  
16 CORPORATION, )  
17 Respondent. )  
18

19 PROCEDURAL BACKGROUND

20 1. By letter dated March 15, 2001, Respondent International Truck  
21 and Engine Corporation (hereafter "International") notified Protestant  
22 (hereafter "Corning"), pursuant to Vehicle Code Section 3060<sup>1</sup>, of  
23 International's intent to terminate Corning's franchise as an  
24 International dealer. A copy of the notice was also served on the  
25 Board.

26 2. Corning is a California corporation, licensed to sell new  
27

28 <sup>1</sup> All statutory references are to the California Vehicle Code,  
unless noted otherwise.

1 motor vehicles in Corning, California. Its sole new motor vehicle  
2 franchise is with International. The shareholders of Corning are Bill  
3 and Barbara Boot, who have operated a truck and radiator repair facility  
4 in Corning since the 1960's, and an International dealership at its  
5 present location along Interstate 5 since acquiring the franchise in  
6 1980.

7 3. International is the successor to International Harvester  
8 Corporation. It is headquartered near Chicago, Illinois and maintains a  
9 dealer network of approximately 371 dealers in the United States and  
10 Canada. It is licensed as a manufacturer and distributor of new motor  
11 vehicles by the State of California.

12 4. Navistar Financial Corporation, doing business as  
13 International Finance Group (hereafter "IFG") provides financing to  
14 International's dealers. International and IFG are each subsidiaries of  
15 Navistar International Corporation.

16 5. Corning filed this Protest pursuant to Section 3060 on April  
17 23, 2001.

18 6. The Protest hearing was held on December 11-14 and 17-19,  
19 2001, before J. Keith McKeag, Administrative Law Judge, in Sacramento,  
20 California. Protestant was represented by Arthur C. Chambers, 2095 Van  
21 Ness Avenue, San Francisco, California. Respondent was represented by  
22 Matthew G. Jacobs and Jeffrey S. Galvin, Downey, Brand, Seymour & Rohwer  
23 LLP, 555 Capitol Mall, Tenth Floor, Sacramento, California. Post-  
24 hearing briefs were filed by the parties and the matter was submitted  
25 for decision on April 30, 2002.

26 THE STATUTORY STANDARD

27 7. When, as here, a seasonable protest has been filed in response  
28 to a notice of intent to terminate a franchise, pursuant to Section

1 3060, the termination cannot go forward until a hearing has been held by  
2 the Board and a determination is made that "good cause" exists for the  
3 termination. Section 3066 provides that the burden of proof to  
4 establish that there is good cause to terminate a franchise is on the  
5 franchisor.

6 8. Section 3061 requires the Board to consider the existing  
7 circumstances including, but not limited to, all of the following:

- 8 (A) Amount of business transacted by the franchisee, as compared  
9 to the business available to the franchisee.
- 10 (B) Investment necessarily made and obligations incurred by the  
11 franchisee to perform its part of the franchise.
- 12 (C) Permanency of the investment.
- 13 (D) Whether it is injurious or beneficial to the public welfare  
14 for the franchise to be modified or replaced or the business  
15 of the franchisee disrupted.
- 16 (E) Whether the franchisee has adequate motor vehicle sales and  
17 service facilities, equipment, vehicle parts, and qualified  
18 service personnel to reasonably provide for the needs of the  
19 consumers for the motor vehicles handled by the franchisee and  
20 has been and is rendering adequate services to the public.
- 21 (F) Whether the franchisee fails to fulfill the warranty  
22 obligations of the franchisor to be performed by the  
23 franchisee.
- 24 (G) Extent of the franchisee's failure to comply with the terms of  
25 the franchise.

26 FACTUAL BACKGROUND

27 9. The Boots opened a radiator repair shop in Corning in 1961. A  
28 few years later they purchased the assets of a neighboring truck repair

1 facility and went into that business. They incorporated in 1973. In  
2 1980, the Boot's purchased a seven (7) acre parcel of land along  
3 Interstate 5 and built a 9,600 square foot building. At that same time  
4 Corning became an International dealer, and leased the newly constructed  
5 facility within which to operate its sales and repair business. Mr.  
6 Boot had no prior experience in vehicle sales or the operation of a new  
7 motor vehicle franchise. One of the reasons for acquiring the  
8 International franchise was to have access to the International parts  
9 program. During its tenure as an International dealer, Corning's main  
10 emphasis has been on sales of repairs and parts, rather than sales of  
11 new trucks. Under the terms of its franchise, Corning is entitled to  
12 sell truck parts and new medium-duty trucks, not heavy-duty trucks.  
13 Because of its location along Interstate 5 it has significant exposure  
14 to a large number of passing heavy-duty trucks for repair and parts  
15 sales, but its rural location means that many of its sales customers are  
16 involved in farming and related activities which make use of medium-duty  
17 trucks.

18 10. Corning's Area Of Responsibility ("AOR") under the franchise  
19 agreement is all of Tehama and Glenn Counties, and parts of Butte and  
20 Colusa Counties. The city of Corning is located approximately 110 miles  
21 north of Sacramento and 50 miles south of Redding. Corning is also an  
22 authorized dealer for truck parts manufactured by Caterpillar, Cummins,  
23 Detroit Diesel, and Allison.

24 11. In 1997, Corning decided to expand its business. It obtained  
25 a Small Business Administration ("SBA") loan of \$745,500. It retired  
26 around \$242,000 of existing debt, put \$220,000 into the construction of  
27 a building which is used to service recreational vehicles ("RVs") and  
28 lubricate trucks, and purchased in excess of \$50,000 of special tools

1 and parts for the truck business. Corning also assumed liability for  
2 \$96,500 as its share of repair to the streets and infrastructure  
3 adjacent to the property, with 50% due immediately and 50% due when  
4 development occurred on other portions of the seven (7) acre parcel.  
5 The Boots estimate that around \$650,000 was spent in total on the  
6 dealership, but no specific breakdown was given, other than as described  
7 above.

8 12. The business expansion did not result in financial success,  
9 and by 1999 Corning was in severe financial trouble. The large debt  
10 incurred in 1997 had resulted in a cash flow crises. Also contributing  
11 to the problem was the effect of flooding which had occurred in  
12 Corning's market area in 1997, hurting the farming industry. Corning  
13 sought additional financing, and succeeded in obtaining an extension on  
14 the repayment of the infrastructure grant. In 1999, the Boots agreed to  
15 sell 2.2 acres of the seven (7) acre parcel, anticipating a cash sale  
16 which would soon close. The sale did not close until February 2001, and  
17 then on terms of 15% down and the remainder payable over time. Now  
18 Corning is hoping that the purchaser will not start development and  
19 trigger the payment of the amount remaining due under the infrastructure  
20 repair agreement.

21 13. Corning's financial problems led to delinquency in its open  
22 account with International. The open account, sometimes called the  
23 parts account, is an account maintained between International and its  
24 dealers which is used to obtain parts, tools, sales materials, and the  
25 like on credit. At the end of each month the financial arm, IFG,  
26 purchases these accounts receivables from International and collects the  
27 amounts due from the dealers. It is expected that the accounts will be  
28 paid current each month, and no debt will be carried over. By March

1 2000, Corning had become delinquent on its parts account. At that time  
2 Corning owed in excess of \$60,000 on the parts account, and a \$31,000  
3 partial payment was dishonored by Corning's bank. As a result, IFG  
4 revoked Corning's credit status and placed it on cash status. This  
5 means that the dealer can no longer use its open account for the  
6 purchase of parts, and must either pay cash at the time of ordering the  
7 parts or set up an escrow account out of which parts purchases can be  
8 paid prior to shipment to the dealer. There is no contention by Corning  
9 that the imposition of the cash status was improper, or that the open  
10 account should have been reopened. The delay necessarily attendant to  
11 having to pay cash prior to the parts being shipped did adversely affect  
12 Corning's parts sales.

13 14. The March 2000 imposition of cash status on Corning's parts  
14 purchases also resulted in IFG placing Corning's flooring account on  
15 "inventory control status." This is not a total revocation of credit  
16 with which to purchase trucks, but does mean that IFG looks carefully at  
17 each order made by Corning and will only give a flooring loan if it is  
18 assured of payment. This means that loans are usually only made on  
19 "sold orders" when the identity of the buyer is known and an assignment  
20 of sales proceeds can be obtained. Absent current financial statements  
21 from the dealer showing a means of payment and a good recent payment  
22 history, flooring would not normally be granted to purchase a truck to  
23 be held in inventory. Corning could not provide such information.

24 15. Corning's poor financial condition meant that Corning had to  
25 cut back on advertising, has been unable to maintain an inventory of new  
26 trucks for sale, and has often been unable to stay current with its  
27 other suppliers. The proceeds from the sale of the 2.2 acre parcel has  
28 improved Corning's cash flow to the extent that all of Corning's other

1 suppliers have reopened credit accounts, but it remains on a cash basis  
2 with International as to parts and on inventory control as to truck  
3 purchases.

4 16. Corning's problems increased in October 2000 when Mr. Boot had  
5 a heart attack and was off work full-time for six weeks and part-time  
6 for four or five months. A dispute exists in the testimony as to  
7 whether International employees involved in making decisions as to the  
8 termination of Corning's franchise were made aware of the heart attack  
9 prior to sending the notice of intention to terminate. Mrs. Boot  
10 testifies that she remembers telling members of International's Dealer  
11 Operations group that Mr. Boot had suffered a heart attack in the period  
12 between its occurrence and the sending of the notice of termination.  
13 The members of that group deny being so advised. The only written  
14 document mentioning Mr. Boot's condition is a fax dated November 7,  
15 2000, which Mrs. Boot sent to an International employee in a department  
16 having no input on the subject of evaluation of dealership performance  
17 or deciding on termination. No mention of Mr. Boot's health problem was  
18 made in any of the written correspondence between the parties regarding  
19 International's notice of breach or notice of intent to terminate.

20 17. In August 2000, International sent Corning a "breach letter"  
21 advising that it considered Corning to be in breach of the franchise  
22 agreement due to poor sales of trucks and poor penetration of its  
23 market, poor stocking levels of truck inventory and demonstrators, lack  
24 of an effective prospect system, insufficient working capital and net  
25 worth to fulfill its duties, and failure to provide sufficient annual  
26 financial and operating statements. It gave Corning until March 15,  
27 2001, to take appropriate corrective action in order to avoid receipt of  
28 a notice of termination.

1 18. On September 8, 2000, Corning responded to the breach letter.  
2 It agreed that it had "failed to achieve a reasonable market share in  
3 the Class 5 new truck market," but noted that parts sales continued to  
4 increase, albeit not as much as the goals set by International. It  
5 noted the infusion of capital which had been made in 1997, and assured  
6 that Corning was actively pursuing a financial plan with its bank which  
7 should revive its credit status. It also noted that Corning was working  
8 hard to maintain its market share, and asserted that it did have one  
9 truck in inventory with one more on order.

10 19. By March 15, 2001, Corning was still facing financial  
11 difficulties. The sale of the 2.2 acres had not raised much cash, no  
12 new bank financing had been obtained, and Corning had sold only one new  
13 truck during the intervening seven months. During the preceding five  
14 year period Corning had sold a total of 11 new trucks, of which nine  
15 were in its AOR. By that time it had a negative working capital of over  
16 \$150,000, and a net worth of only a little over \$50,000, down from the  
17 almost \$160,000 it had been nine months earlier. It was on a cash basis  
18 for its parts purchases and on a very limited flooring line.  
19 International served Corning and the Board with its notice of intention  
20 to terminate the franchise. This Protest followed.

21 ANALYSIS<sup>2</sup>

22 **Has Corning Transacted an Adequate Amount of**  
23 **Business Compared to the Business Available?**

24 20. In the five fiscal years ending October 31, 2001, Corning sold  
25 nine new trucks into its AOR, an average of less than two per year.

---

26  
27 <sup>2</sup> Findings of fact are grouped in the most logical category and  
28 have been considered for each of the good causes factors and "the  
existing circumstances."

1 This figure alone, however, does not show how Corning's sales compared  
2 to the business available to it in the market. To derive this  
3 information International, as do almost all automobile and truck  
4 franchisors, makes use of registration data furnished by the R.L. Polk  
5 Company which allow a determination of a dealer's penetration rate or  
6 share of the sales made of certain types of vehicles in the dealer's  
7 AOR, as compared to the penetration rate of other International dealers  
8 in the area in their AORs. Here, all the dealers compared were  
9 franchised to sell medium-duty trucks in an area known as Area 624 which  
10 comprised most of California and Nevada. By using a comparison of sales  
11 of similar types of vehicles in a surrounding geographic area, similar  
12 market factors effect most or all of the dealers used for comparison.

13 21. For the six year period ending October 31, 2000, Corning's  
14 penetration rate in its AOR, as compared to the other International  
15 dealers' penetration rates in their AORs is as follows:

16 One-Year 17 Period Ending	Corning's Market Penetration (Percent)	Average Penetration of Other Dealers in Area 624 (Percent)	Corning's Rank Among Other Dealers in Area 624
18 10/31/95	12.5	22.2	10/10
19 10/31/96	4.8	24.1	14/15
20 10/31/97	13.0	21.5	11/15
21 10/31/98	7.1	33.8	15/15
22 10/31/99	16.7	30.3	13/14
23 10/31/00	4.5	23.3	13/14

24 Corning did not dispute the accuracy of these figures.

25 22. Corning's expert witness conceded that comparing Corning's  
26 sales penetration to that of other International dealers in the  
27 California/Nevada area was a fair method to use, that Corning should be  
28 able to meet the average penetration of the International dealers in the

1 area absent special circumstances, and that based on penetration rate  
2 figures alone International would have good cause to terminate Corning  
3 as a dealer.

4 23. Corning's annual sales numbers also indicate that Corning's  
5 low sales were consistent. In fiscal year 1998, it sold three. In  
6 fiscal year 1999, it sold one. In fiscal year 2000, it sold two. In  
7 fiscal year 2001, it sold three.

8 24. Parts purchases cannot be measured by reference to penetration  
9 rates, because of the unavailability of registration data. The  
10 uncontradicted expert testimony presented by International was that the  
11 standard industry measurement is based on the amount of parts purchased  
12 by the dealer, that in the truck industry dealers are expected to  
13 achieve 100% of the goals set by the franchisor, and most do. Corning's  
14 parts purchases were as follows:

15 One-Year Period 16 Ending	Corning's Parts Purchases (Dollars)	Corning's Parts Goal (Dollars)	Purchases as Percentage of Goal
17 10/31/98	703,032	819,540	85.8
18 10/31/99	720,505	810,000	89.0
19 10/31/00	692,297	803,290	86.2
20 10/31/01	467,757	737,162	63.5

21  
22 25. International's expert witness also testified that truck  
23 dealers should normally turn over their parts inventory four times per  
24 year. Corning indicated that its goal was a turn over rate of three  
25 times per year. Corning's actual turn over rate during the period 1995-  
26 2001 ranged between 1.5 and 1.9 times per year.

27 26. Based on the facts set out above, it is concluded that Corning  
28 has not transacted an adequate amount of business as compared to the

1 business available to it.

2 **What Investment Has Necessarily Been Made And What Obligations**  
3 **Incurred by Corning to Perform Its Part of The Franchise?**

4 27. While Corning is a corporation, its only shareholders are Mr.  
5 and Mrs. Boot, who are the landowners and the persons who have obligated  
6 themselves on loans and infrastructure repayment agreements over the  
7 years, and have been the management team who have run the dealership  
8 since its inception. It would grant too much importance to the legal  
9 fiction of the corporation to ignore the obligations and investments of  
10 the Boots in determining this and other similar issues in this case.

11 28. The dealership sits on an approximately five (5) acre parcel  
12 remaining from the seven (7) acres purchased in 1980. The SBA loan  
13 obtained in 1997 used the land as security, and over \$600,000 of the  
14 loan proceeds were invested in the business. While much of that money  
15 was used to construct a facility used to service both trucks and RVs, no  
16 testimony was presented which would allow an allocation of cost or fair  
17 market value to the uses which are incurred by reason of the  
18 International franchise. Suffice it to say, since 1980 a substantial  
19 investment has been made in the business facility which is used for the  
20 sale and repair of trucks, and in the parts and tools necessary to  
21 perform that work. Since 1997, the financial condition of the  
22 dealership has eroded, as detailed elsewhere, and Corning is unable to  
23 operate the business with open account credit or with an unrestricted  
24 flooring loan.

25 29. The infrastructure repayment agreement was an obligation  
26 incurred to improve the streets and utilities around the parcel on which  
27 the dealership is located. While one effect of this work was to make  
28 the parcel a more marketable commodity, it also had the effect of

1 improving the access to the dealership, and improving the parking along  
2 the adjoining street. Again, no allocation can be made, but it was a  
3 substantial obligation which was incurred, in part, to perform the  
4 dealer's part of the franchise.

5 **Is There a Permanent Investment in the Dealership?**

6 30. The dealership has been in operation at the same site since  
7 1980. It has a sales and repair facility. The dealership is owned by  
8 the same people who own the land on which it sits. It has had a staff  
9 of employees it has paid over that 22 year period. It has purchased  
10 parts, tools, and trucks from International for 22 years. Even after  
11 the financial difficulties it has faced for the last few years the  
12 corporate fixed assets were valued on its books at over \$200,000.  
13 Substantial obligations were incurred to improve the infrastructure of  
14 the dealership property.

15 31. There has been a permanent investment made in the dealership.

16 **Would it Be Injurious or Beneficial to The Public Welfare  
17 For The Business of the Franchisee to Be Terminated?**

18 32. With new truck sales of less than two per year, even Corning's  
19 expert witness conceded that termination of the dealership's ability to  
20 sell new International trucks would not have a substantial effect on the  
21 public's ability to buy trucks. International's witnesses testified  
22 that if a dealer closes or is terminated they take steps to see that the  
23 AOR is not left "open," but is reassigned to adjoining dealer(s) or a  
24 new dealer is appointed in the AOR as soon as an acceptable candidate  
25 can be located.

26 33. In 2000, Corning performed around \$52,000 in warranty repair  
27 work. In 2001, Corning performed around \$75,000 in warranty repair  
28 work. International's witnesses testified that if a dealer closes or is

1 terminated, International uses its sales and service records to contact  
2 customers in the area and let them know how their warranty and non-  
3 warranty repair work will be taken care of. That is accomplished by  
4 directing customers to the nearest International dealers, and contacting  
5 surrounding International dealers to see that they make their mobile  
6 maintenance vehicles available in the area until a new dealer can be  
7 established. If the area is determined to be unsuitable for a new sales  
8 facility, International will appoint a service dealer who is authorized  
9 to perform warranty work and acquire parts directly from International.  
10 In fact, this arrangement was suggested to Corning by International as  
11 long ago as 1995.

12 34. As to non-warranty work on International trucks and work on  
13 other lines of trucks, Corning and the other repair facilities in the  
14 area who have been doing the work in the past will be able to continue  
15 to do the work. The only effect of termination would be that Corning  
16 could no longer order parts directly from International, but would have  
17 to buy them from another International dealer. Since Corning has been  
18 delayed in obtaining parts from International due to its cash upon  
19 ordering status, there should not be any significant difference in the  
20 delay attendant to obtaining parts from another dealer. Corning may  
21 have to pay more for the parts from another dealer, than it does from  
22 International, but there was no testimony as to whether Corning has  
23 charged less for parts than other independent dealers in the area, so no  
24 conclusion can be reached as to the effect this might have on the  
25 consuming public.

26 35. Since Corning has factory-trained technicians on its staff, if  
27 Corning is terminated as a franchisee and no new sales franchise is to  
28 be established in that area, it would be sensible for International to

1 again offer to make Corning an authorized parts and service dealer, and  
2 for Corning to accept that offer. Even until such time as Corning could  
3 regain open account status, it would benefit from buying parts at  
4 wholesale and representing itself as an authorized warranty repair  
5 facility.

6 36. It is concluded that termination of Corning as an authorized  
7 International sales franchise will have no significant injurious effect  
8 on the public welfare. Termination as an authorized International  
9 warranty dealer may have some injurious effect for the interim period  
10 until a new authorized warranty facility can be established in the area,  
11 using either Corning or one of the many other repair facilities in the  
12 area but it cannot be said that the effect would be significant. There  
13 will be no effect on the public's ability to obtain non-warranty repair  
14 work on trucks of any make. There is no basis for concluding that there  
15 will be any significant benefit to the public, since it would not appear  
16 that the City of Corning is necessarily an appropriate place to locate a  
17 replacement sales franchise. If it were to be replaced by a dealer in  
18 that area which sold trucks at a rate comparable to other International  
19 dealers in the general area, the increased inter-brand and intra-brand  
20 competition would benefit the public.

21 **Does Corning Have Adequate Sales and Service Facilities,**  
22 **Equipment, Parts and Service Personnel, and Has it Been**  
23 **Rendering Adequate Service to The Public?**

24 37. International does not contend that Corning's sales and  
25 service facilities, equipment, parts or service personnel are  
26 inadequate, or that Corning has been rendering inadequate service to the  
27 public. This question may, thus, be answered in the affirmative.

28 ///

///

1                   **Has Corning Failed to Fulfill the Warranty Obligations**  
2                   **Of The Franchisor Which it Is to Perform?**

3           38. International does not contend that Corning has failed to  
4 perform any of International's warranty obligations which Corning is to  
5 perform. This question may, thus, be answered in the negative.

6                   **To What Extent Has Corning Failed to**  
7                   **Comply with The Terms of the Franchise?**

8           39. Paragraph 16 of the franchise agreement is entitled "Operation  
9 Requirements" and sets forth a number of terms and conditions which are  
10 to be met by the franchisee, and which International contends have been  
11 breached by Corning.

12           40. The first of these is paragraph 16(a)(2) which requires the  
13 franchisee: "To provide at all times sufficient working capital and net  
14 worth to enable it to fulfill properly all of the Dealer's  
15 responsibilities and duties under the Agreement."

16           41. Since the expansion of the business in 1997, Corning's  
17 financial condition has eroded to the point that it is unable to operate  
18 in a reasonable business manner. It has lost its credit status with its  
19 principal supplier of parts, it is on an inventory control flooring  
20 status which severely restricts its ability to maintain any sort of  
21 adequate inventory of trucks for sale or to be used as demonstrators,  
22 and by the Spring of 2001 its net worth had declined to only slightly  
23 more than \$50,000, and its working capital was negative by over  
24 \$150,000.

25           42. While Corning concedes that IFG did not act wrongfully in  
26 revoking Corning's open account privileges, it seems to contend that  
27 because it imposed a requirement of cash upon ordering, rather than a  
28 cash upon delivery requirement, Corning's failure to comply with

1 paragraph 16(a)(2) should be excused. The problem, of course, with this  
2 argument is that the revocation of credit was caused by Corning's  
3 already poor financial condition, i.e., being put on a cash basis did  
4 not cause the business to lose its credit-worthiness, rather its loss of  
5 credit-worthiness was caused by a variety of events, some external and  
6 some internal, and that resulted in being put on a cash basis. While  
7 cash on ordering may be considered more onerous than cash on delivery,  
8 no convincing evidence was presented from which it could be determined  
9 that imposition of the latter would have resulted in Corning being able  
10 to comply with paragraph 16(a)(2) of the franchise agreement. On the  
11 record which exists, the breach of this provision by Corning is  
12 substantial.

13 43. At the time of the hearing Corning also asserted that IFG had  
14 somehow increased the severity of Corning's financial problems by  
15 refusing to release its UCC-1 (a security interest filing). No mention  
16 of this position is made in Corning's post-hearing brief, however, and  
17 the evidence showed it to be without merit. International was under no  
18 legal obligation to release its UCC-1. No written demand was ever made  
19 of such a release until the eve of hearing. It became clear that what  
20 Corning really may have wanted was a "subordination," but had never  
21 asked for one. No convincing showing was ever made that third-party  
22 financing would have been forthcoming if a release or subordination had  
23 been requested and granted.

24 44. The second provision asserted to have been breached is  
25 paragraph 16(b)(1) which requires the dealer to "achieve a reasonable  
26 share of the market." The provision goes on at length to detail that  
27 the market share is measured in the dealer's trade area (its AOR), that  
28 the dealer's market penetration in its AOR will be compared to other

1 International dealers in their AORs, and that: "In any event,  
2 [International] will consider any factors relevant to the Dealer's  
3 performance as an entity, so that while the dominant tests are to be  
4 objective ones, equities of the Dealer shall temper the results of such  
5 tests."

6 45. As shown above, since 1995 Corning's penetration rate has  
7 been, at best, barely half that of the average penetration rate of the  
8 California/Nevada dealers to which it was compared, and many years it  
9 has been much worse. It has ranked near or at the bottom of all of the  
10 International dealers in that area. As Corning's expert conceded, if  
11 only the numbers are examined there is no question that good cause  
12 exists to terminate the dealership.

13 46. Corning contends, however, that International has not  
14 considered, as an equitable factor which should temper the results of  
15 those penetration surveys, that Mr. Boot suffered a heart attack in  
16 October 2000. A dispute exists as to whether any International employee  
17 involved in the evaluation of Corning's performance was made aware of  
18 Mr. Boot's heart attack. Even if it is assumed that International was  
19 aware of his condition at some point after October 2000, it cannot be  
20 concluded that such knowledge would have been such as to wipe out the  
21 dominate objective penetration results. Mr. Boot's heart attack did not  
22 occur until almost the complete end of fiscal year 2000, which is the  
23 last year of the six-year penetration rate study set out above. It,  
24 thus, had no effect on the very poor showing which Corning had been  
25 making for years, and simply cannot be used to "temper" those results or  
26 the conclusion to which they lead as to Corning's failure to achieve a  
27 reasonable share of the market. Neither did the heart attack result in  
28 an "incapacity" which would trigger termination of the franchise under

1 paragraph 30, or deferral of termination for incapacity under paragraph  
2 31 of the franchise agreement. Similarly, the fact that Corning's  
3 expansion occurred at around the same time as a flood which hurt the  
4 local economy and lead to financial problems, cannot explain away a poor  
5 market share which preceded the event and continued on after the event.  
6 The fact of the matter is that Corning did not ever emphasize truck  
7 sales, and viewed itself as a truck repair facility that also sold a few  
8 trucks. This resulted in very poor sales and a very poor penetration  
9 rate, without regard to Mr. Boot's health or the effect of a flood.

10 47. The third provision asserted to have been breached is  
11 paragraph 16(b) (2) which requires the dealer to aggressively promote  
12 truck sales. The only reasonable explanation for Corning's poor sales  
13 figures and poor penetration rates is Corning's failure to aggressively  
14 promote the sale of trucks, and instead emphasize repair work to a very  
15 high degree.

16 48. The fourth provision asserted to have been breached is  
17 paragraph 16(b) (4) which requires the dealer to maintain a sufficient  
18 inventory of trucks. While Corning may have had a truck or two in  
19 inventory on occasion, the inventory control status of its flooring line  
20 made it very difficult to maintain an adequate inventory. It is clear  
21 that on the date of the notice of termination, March 15, 2001, Corning  
22 did not have any International truck in inventory, and was in breach of  
23 this provision.

24 49. The fifth provision asserted to have been breached is  
25 paragraph 16(b) (5) which requires the dealer to place orders for trucks.  
26 Again, while Corning had clearly ordered trucks over the time it was a  
27 dealer, its financial problems and the resultant inventory control  
28 status of its flooring line made the ordering of trucks a rare event in

1 recent years. At the time of the breach letter and the termination  
2 letter, Corning had no truck on order. It did order a truck after the  
3 breach letter but without making any payment provisions so that order  
4 was canceled. At the time of the termination letter and at the time of  
5 the hearing, Corning was in breach of this provision.

6 50. The sixth provision asserted to have been breached is  
7 paragraph 16(b)(6) which requires the dealer to participate in  
8 demonstrator programs. At the time the breach letter was sent,  
9 International was conducting a demonstrator program in which dealers  
10 were to exhibit trucks to potential customers in various ways. Corning  
11 did not participate in this program. It was in breach of this  
12 provision.

13 51. The seventh provision asserted to have been breached is  
14 paragraph 16(b)(7) which requires the dealer to maintain an effective  
15 prospect system by which to locate prospective purchasers. Corning's  
16 poor sales performance would indicate that it did not have an effective  
17 system for customer prospecting. It does do some advertising, in the  
18 form of calendars, mailings, and Yellow Pages listings, along with some  
19 limited television ads and ads in industry publications. Corning did  
20 not, however, present any evidence of having a "current list of  
21 prospective purchasers of International vehicles" as is required by  
22 paragraph 16 (b) (7).

23 52. While breaches of the requirements to participate in  
24 demonstrator programs and keep lists of prospective purchasers would  
25 not, individually, be of a substantial nature, when viewed as part of a  
26 systematic failure to perform virtually all of the obligations which  
27 result in satisfactory sales of the trucks, they take on more  
28 importance. A dealer cannot hope to sell trucks if it does not order

1 and stock trucks, and aggressively work to sell those trucks, thereby  
2 achieving a reasonable share of the market. It cannot order and stock  
3 trucks if it does not have sufficient working capital and net worth to  
4 obtain those trucks under the normal financing arrangements used by  
5 dealers. Here, Corning's failure to comply with the terms of the  
6 franchise agreement has been extensive and substantial. This is  
7 especially so since the sale of vehicles is the very essence of the  
8 agreement between a new motor vehicle franchisor and its dealers, and it  
9 is the provisions dealing with that obligation which Corning has failed  
10 to perform for many years. A franchisor is entitled to have as its  
11 franchisee, one which will adequately perform these crucial aspects of  
12 the franchise agreement.

13 **Has International Dealt Unfairly With Corning?**

14 53. In its post-hearing brief, Corning makes four contentions of  
15 bad faith or unfair treatment by International which it asserts should  
16 result in denial of the termination. The first of these is that, in the  
17 breach and termination letters, International had asserted that Corning  
18 had breached paragraph 25 of the franchise agreement which requires  
19 dealers to furnish International each year with audited financial and  
20 operating statements. At the outset of the hearing, International  
21 conceded that it had so habitually accepted unaudited statements from  
22 its dealers, including Corning, that it had waived that contractual  
23 requirement and would not seek to assert in this proceeding that Corning  
24 was in breach of that provision. Corning had never sought to provide  
25 audited statements, and no evidence was presented of any harm befalling  
26 Corning between the time of the breach letter and the acknowledgment of  
27 waiver on the first day of the hearing. This claim cannot provide a bar  
28 to termination.

1           54. The second claim of bad faith is that International employees  
2 involved in evaluating Corning's performance did know of Mr. Boot's  
3 heart attack soon after it occurred but deny such knowledge. The  
4 testimony is directly contradictory, and no documentary evidence has  
5 been produced which speaks to the issue. As stated above, Mr. Boot's  
6 heart attack occurred so late in the relationship, after years of poor  
7 sales performance and severe financial decline, it could not be said  
8 that it should have tempered the evaluation in any event. Absent that,  
9 there does not seem to have been any damage suffered by Corning even if  
10 it is assumed that International did have knowledge of the heart attack  
11 before it sent the termination letter. This claim cannot provide a bar  
12 to termination.

13           55. The third claim of bad faith is that IFG put Corning on cash  
14 on ordering status, rather than on cash on delivery status. Corning  
15 conceded that revoking Corning's credit status was not wrongful. A  
16 creditor is entitled to take such steps as are reasonably required to  
17 protect itself against default, and it cannot be said that invoking one  
18 form of cash status rather than another is an act of bad faith. This is  
19 especially so in that there was no convincing showing that imposition of  
20 cash on delivery rather than cash on ordering would have made any  
21 significant change in Corning's financial condition. This claim does  
22 not provide a bar to termination.

23           56. The final claim of bad faith is that International did not  
24 allow Corning to set up an escrow account arrangement so that Corning  
25 could purchase engine oil from a third-party using the International  
26 open account. International's witness explained that the problem with  
27 such an arrangement would be that a dealer could order unlimited amounts  
28 from the third-party supplier and those amounts would go onto the open

1 account without any control by International, and could easily exceed  
2 the amount which had been placed in escrow with International. Because  
3 International could not control the purchases from the third-party, they  
4 refused to authorize the procedure. It cannot be said that such a  
5 response was an act of bad faith, especially in light of Corning's lack  
6 of credit-worthiness. This claim cannot be a bar to termination.

7 **Determination of Issues**

8 57. Corning has not transacted a sufficient amount of business, as  
9 compared to the business available to it.

10 58. Corning made a significant investment and incurred sufficient  
11 obligations at the commencement of the business, but financial reversals  
12 stemming from expansion of the business in 1997 and poor truck sales  
13 have resulted in Corning having insufficient capital and cash flow to  
14 operate the business with open account credit or with an unrestricted  
15 flooring loan. Corning's poor credit status prevents it from ordering  
16 or stocking new trucks on a normal basis, and from obtaining parts for  
17 repair work or resale on as timely a basis as would normally occur.

18 59. Corning has a significant permanent investment in the  
19 dealership.

20 60. It would not be injurious or beneficial to the public welfare  
21 for the franchise to be terminated.

22 61. Corning has adequate sales and service facilities, equipment,  
23 vehicle parts and qualified service personnel to reasonably provide for  
24 the needs of the consumers for the International trucks handled by it,  
25 and is rendering adequate service to the public.

26 62. Corning has not failed to fulfill the warranty obligations of  
27 International to be performed by Corning.

28 63. Corning has failed to comply with the terms of the franchise

1 to a significant extent, by its failure to sell a sufficient number of  
2 trucks or to have a sufficiently high penetration rate in its market  
3 area. This has resulted from a failure to aggressively promote sales,  
4 to provide sufficient working capital and net worth to enable it to  
5 fulfill its obligations under the franchise, to maintain a sufficient  
6 inventory in stock or as demonstrators, to order new trucks on a timely  
7 basis, to participate in demonstrator programs, or to maintain an  
8 effective prospect system. Each of these failures resulted in  
9 significant breaches of material terms of the franchise.

10 64. International has not acted unfairly or in bad faith in its  
11 dealings with Corning.

12 65. International has established that good cause exists to  
13 terminate the franchise.

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 PROPOSED DECISION

2 The protest of Corning is overruled. Respondent has established  
3 that there is good cause to terminate Protestant's franchise.  
4 Respondent shall be permitted to terminate the franchise upon the  
5 effective date of this decision.  
6

7  
8 I hereby submit the foregoing which  
9 constitutes my proposed decision in  
10 the above-entitled matter, as a  
11 result of a hearing before me on the  
12 above dates and recommend the  
13 adoption of this proposed decision as  
14 the decision of the New Motor Vehicle  
15 Board.

16 DATED: *May 14, 2002*

17  
18 By   
19 J. KEITH MCKEAG  
20 Administrative Law Judge  
21  
22  
23  
24  
25  
26

27 Steven Gourley, Director, DMV  
28 Terri Thurlow, Chief,  
Licensing Branch,