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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
S. O. McDONALD, S. O. McDONALD) Protest No. PR-276-80
ENTERPRISES, INC., dba ROYAL)
VOLVO/SUBARU,)
Protestant,)
vs.)
VOLVO OF AMERICA CORPORATION,)
Respondent.)

DECISION

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

This Decision shall become effective forthwith.

IT IS SO ORDERED this 7th day of October, 1980.


KATHLEEN O. TURNER
President
New Motor Vehicle Board

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SUBARU,)
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vs.)
VOLVO OF AMERICA CORPORATION,)
Respondent.)

PROPOSED DECISION

Procedural Background

1. On June 6, 1980, Volvo of America Corporation, (Volvo of America) issued a letter of intent to offer a Volvo Sales Agreement to Carlsen Subaru, Inc., (Carlsen) located at 4190 El Camino Real, Palo Alto, California, 94306. The letter of intent was accepted by Carlsen on the same date. Shortly thereafter, Carlsen began operation as a Volvo franchisee after having received a temporary permit from the Department of Motor Vehicles.

2. Prior to establishment of Carlsen, Volvo of America did not give notice to the New Motor Vehicle Board (Board) as required by Vehicle Code Section 3062 (a)^{1/} because Volvo of America believed it was reopening a dealership that had been out of operation for less than one year.

3. On June 18, 1980, a protest was filed with the Board by S.O. McDonald and S.O. McDonald Enterprises, Inc., dba Royal Volvo/Subaru (Royal) located at 805 East El Camino Real, Sunnyvale, California, 94087.

4. On June 18, 1980, Volvo of America was notified by the staff of the Board that a protest had been filed and that Volvo of America should comply with the notice requirements of Vehicle Code Section 3062. Volvo of America gave notice to the Board in a letter dated June 19, 1980.

5. On July 8, 1980, Volvo of America filed a Motion to Dismiss the Protest contending that the Board had no jurisdiction over the matter. Volvo of America contended that Royal had no right to a hearing on the protest because establishment of Carlsen was not the establishment of an additional dealership.

6. The motion to dismiss was heard and testimony taken on July 8, 1980, before Anthony M. Skrocki, Administrative Law Judge of the Board. It was determined that Royal was entitled to a hearing on the protest and a hearing was held pursuant to Section 3066 before Administrative Law Judge Skrocki on August 4, 5, 6, 7, and 8, 1980.

1. Unless otherwise indicated all references to code sections are to the California Vehicle Code.

7. Royal was represented by Stephen Gazzera, Jr., of the law firm of Gazzera and Antoniololo. Volvo of America was represented by John D. Stumbos, Jr., of the law firm of Stumbos and Mason.

JURISDICTIONAL ISSUES

8. Volvo of America contends that the establishment of Carlsen at 4190 El Camino Real, Palo Alto was the reopening of a dealership that had been out of operation for less than a year.

(a) Through the end of August, 1979, Fred Haeckl Enterprises, Inc., dba Volvo of Palo Alto (Haeckl) was franchised as a Volvo dealer with its sales business conducted at 4195 El Camino Real, Palo Alto. Haeckl's franchise agreement precluded vehicle sales from being made at any location other than 4195 El Camino Real and his dealer license was issued for that address.

(b) Carlsen was appointed as a Volvo franchisee on June 6, 1980, less than one year from the cessation of business by Haeckl. However, Carlsen was not established to sell vehicles at the same location at which Haeckl had been. The Carlsen location is the former location of the Haeckl service and parts operation at 4190 El Camino Real. This location is across the street from the former Haeckl sales operation which was located at 4195 El Camino Real. It, therefore, could be concluded that under these facts, the failure to reopen at the exact same address should not preclude Volvo of America from taking advantage of the exception granted by

Section 3062. The difficulty with this result involves the possibility that such an interpretation could lead to a franchisor "reopening" a dealership at a former service or used car facility that had been located a greater distance from the sales facility than attempted in this case.

(c) It is therefore determined that Volvo of America is attempting to establish an additional franchise and is not "reopening" a dealership within the meaning of Section 3062 (a).

9. Royal contends that Volvo of America is relocating an existing dealership more than one mile from an existing location. This contention is based on the fact that Carlsen had purchased some of the assets of Premier Volvo (Premier) which was a Volvo dealership in San Carlos until it closed on May 8, 1980.

(a) It is determined that the intended establishment of Carlsen is not an attempted relocation of Premier for the following reasons:

1. Premier ceased operation May 8, 1980.
2. Carlsen was not appointed a Volvo franchise until June 6, 1980.
3. Carlsen purchased only part of Premier's assets. These consisted of Premier's new car inventory, special Volvo tools, an alignment rack, and a showroom literature stand. These purchases were conditioned on Carlsen obtaining a Volvo franchise and were made at Volvo of America's suggestion. This was done to avoid the necessity of Volvo of America repurchasing most of them from Premier and to allow Carlsen to expeditiously acquire inventory and special tools.

ISSUES PRESENTED

10. Royal contends that good cause exists for not establishing Carlsen as an additional franchisee at the proposed location for the following reasons:

- (a) Royal's investment is permanent and Carlsen's will not be; (3063 (1))
- (b) There will be an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area; (3063 (2))
- (c) It will be injurious to the public welfare for an additional franchise to be established; (3063 (3))
- (d) The Volvo franchisees in the relevant market area are providing adequate competition and convenient consumer care for Volvo owners in the market area including the providing of adequate sales and service facilities, equipment, supply of parts and qualified service personnel; (3063 (4))
- (e) The establishment of the additional franchise would not increase competition and therefore would not be in the public interest. (3063 (5))

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FACTS RELATING TO THE
PERMANENCY OF INVESTMENT (§3063 (1))

11. Royal has been operated and controlled by S.O. McDonald for ten years. McDonald has been the majority owner of Royal for the past six years.

12. Royal has been occupying its premises under a ten-year lease which expires in September, 1980. The rent is \$2,500 per month plus one-half of the taxes.

13. Royal has entered into a new lease effective September 1, 1980, for an additional 5 years. The new rent is \$5,500 per month plus all taxes and includes a provision for increase of rent tied to the Consumer Price Index.

14. The terms of the new lease are favorable in that the lease can be terminated easily or the property can be sublet. The property is suitable for other uses that could produce more revenue per square foot than does an auto dealership.

15. In August, 1979, Haeckl ceased operation of his Volvo franchise in Palo Alto.

16. In November, 1979, Volvo of America agreed with both Royal (in Sunnyvale to the south of Palo Alto) and Premier (in San Carlos to the north of Palo Alto) that Volvo of America would not establish a dealership in Palo Alto at least during the 1980 calendar year. This agreement was based on a commitment that Royal would relocate to the north, preferably in the Mountain View area, and Premier would relocate to the south. It was also based

on Royal and Premier assuming sales and service responsibility for the Palo Alto Area of Responsibility (AOR)^{2/} and improving Volvo penetration in that area.

17. The agreement between Volvo of America and Royal was memorialized by a letter signed by both Royal and Volvo of America. Although McDonald signed the letter on behalf of Royal, he did not return a signed copy to Volvo of America on the advice of his manager.

18. Royal has been attempting to purchase suitable property to the north, but its efforts have been unsuccessful. Only one suitable site was found, but the owner rejected an offer of \$1,000,000 for a 2-acre parcel.

19. Royal was exclusively a Volvo dealer prior to the second quarter of 1979 at which time it acquired a Subaru franchise.

20. Royal intended to relocate its Volvo franchise to the north and continue its Subaru franchise at Royal's present location.

21. McDonald was not active at Royal from October, 1978, until about May, 1980. He spent almost all of his time in Walnut

2. Areas of Responsibility are determined by Volvo of America through its Market Representation Department. These designations are the result of studies which take into consideration population density, vehicle registrations (Volvo and its competitors) and demographics among other things. Volvo of America uses Areas of Responsibility to gauge a dealer's performance in a designated area.

Creek at his Ford dealership until he sold it. Royal was run by a full-time general manager who left in April, 1980.

22. Carlsen operates a Subaru franchise at the proposed Volvo location, and if permitted to operate a Volvo franchise, will continue with both at the same location.

23. Royal did not protest the relocation of Carlsen Subaru because Subaru insisted Royal waive its rights to protest as a condition to Royal acquiring a Subaru franchise.

24. Carlsen subleased the premises at 4190 El Camino Real from Chrysler Realty Corporation effective 10/15/79 thru 10/31/83. The property is leased by Chrysler Realty from a third party under a ground lease which gives Chrysler Realty two 10-year options to renew.

25. Carlsen began discussions with Volvo of America in an effort to obtain a Volvo franchise in the Palo Alto area in September or October, 1979. At that time, Carlsen was assured that it would be given the franchise if it was successful in obtaining the lease from Chrysler.

26. Although Carlsen acquired the property at 4190 El Camino Real, Volvo of America reneged on its promise of franchising Carlsen. Negotiations between Carlsen and Volvo of America broke off at the end of October, 1979.

27. In December, 1979, Carlsen, which has been a Subaru dealer for about three years, moved its dealership from another Palo Alto location to 4190 El Camino Real.

28. Carlsen had no further contact with Volvo of America until May, 1980, at which time it learned that Volvo of America was considering reopening the Palo Alto point.

29. At Volvo of America's suggestion, Carlsen arranged for the acquisition of the Volvo new car inventory and some of the Volvo parts and special tools from Premier Volvo in San Carlos which had already ceased business.

30. Carlsen received a letter of intent from Volvo of America on June 6, 1980, and operated as a Volvo franchisee under a temporary permit from the Department of Motor Vehicles through July 28, 1980. Carlsen has not sold or serviced, under warranty, any Volvo vehicles since July 28, 1980.

31. Carlsen purchased 30 new Volvos from Premier at a cost of \$270,000 to \$280,000 plus paying \$150,000 to Premier for the other purchases.

32. Although the building Carlsen acquired at 4190 El Camino Real was going to be painted anyway, Carlsen painted the building in Volvo colors and spent approximately \$30,000 in capital improvements in anticipation of receiving the Volvo franchise.

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33. Carlsen has spent approximately \$400,000 on the premises in anticipation of receiving the Volvo franchise.

34. During the time Carlsen operated as a Volvo dealership, it sold about 12 - 14 Volvos. It also purchased 2 - 3 other Volvos from other Volvo dealers in addition to those purchased from Premier.

FACTS PERTAINING TO THE EFFECT ON THE RETAIL
MOTOR VEHICLE BUSINESS AND THE CONSUMING PUBLIC
IN THE RELEVANT MARKET AREA (§3063 (2))

35. Royal is approximately 7.3 miles driving distance south of the proposed location and approximately 4 miles driving distance to the north of Smythe European (Smythe), also a Volvo dealer. ^{3/}

36. A Volvo dealership was in Palo Alto when Royal was established at its present location and one has been there throughout the entire time of Royal's existence. Harris terminated in May, 1979, after approximately 12 years in operation and Haeckl, who opened 10 days after Harris closed, ended his franchise in August, 1979, after about 3 months of operation.

37. The nearest Volvo dealer to the north of Palo Alto was Premier in San Carlos, approximately 10 miles from the proposed location.

3. The straight line distance between Royal and the proposed location is approximately 6 miles. The straight line distance between Royal and Smythe is approximately 4 miles.

38. In late 1979, Volvo of America decided to cover the Palo Alto market by relocating Premier southward and Royal to the north. This relocation was to occur during 1980. Volvo of America also expected Premier and Royal to improve on Volvo's market penetration in the Palo Alto area.

39. Premier closed in May, 1980. Royal was having difficulty locating land to the north and Volvo of America had previously been told by McDonald that Royal probably could not move during 1980 because of the problems McDonald was having with his Ford dealership in Walnut Creek. During this time, Volvo of America's penetration of the Palo Alto area was decreasing.

40. As a result of the closure of Premier and the probable inability of Royal to relocate during 1980, Volvo of America decided to put a dealer in Palo Alto contrary to its prior agreement with Premier and Royal.

41. Although there were some discussions in mid May of 1980, Volvo of America did not formally notify Royal of its intention to establish a dealer in Palo Alto until the letter of intent was issued to Carlsen on June 6, 1980.

42. Volvo of America does not intend to reopen the former Premier location but intends to relocate its Burlingame dealer further south as soon as the dealer can find a suitable facility.

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43. Smythe initially opened about 7 miles from Royal, but moved to its present location, approximately 4 miles from Royal, in about 1977. At that time, Royal was told by Volvo of America that Smythe's move was temporary and that Smythe would be building a permanent location farther from Royal in the San Jose area.

FACTS RELATING TO WHETHER IT WOULD BE
INJURIOUS TO THE PUBLIC WELFARE FOR AN ADDITIONAL
FRANCHISE TO BE ESTABLISHED (§3063 (3))

44. The prior Volvo dealer in Palo Alto (Haeckl) was dualled with a Chrysler franchise. When Haeckl decided to give up his Chrysler franchise, he had to surrender the lease held by Chrysler and thus had to terminate his Volvo franchise as well.

45. Harris, the Volvo franchisee prior to Haeckl, also operated as a dual Volvo/Chrysler-Plymouth dealership. During the time Harris was in business in Palo Alto, Harris and Royal enjoyed profits from their respective Volvo operations.

46. The Palo Alto AOR, which includes the towns of Redwood City, Redwood Shores, Atherton, Menlo Park, Woodside, and Palo Alto, has the highest ratio of Volvo units in operation to population of any of the AOR's from the San Francisco AOR in the north to the Los Gatos AOR in the south.

47. The following figures indicate the percentage of total sales by Royal and Premier registered in the Palo Alto AOR:

<u>YEAR</u>	<u>DEALER</u>	<u>% OF DEALER'S SALES REGISTERED IN THE PALO ALTO AOR</u>
1978	Royal	8.8%
	Premier	23.5%
1979	Royal	7.8%
	Premier	21.7%
1980	Royal	9.5%
Jan - May	Premier ^{4/}	21.6%

48. The major portion of Royal's sales for the years 1977, 1978, and 1979 were registered outside of Royal's AOR (Sunnyvale). Most of Royal's sales were registered to the south of its AOR into the San Jose AOR where Smythe is located.

49. For 1980 year to date through May, Royal was in the top 10% of the Volvo dealers in the nation and second in the San Francisco District in sales.

4. Premier ceased operation in May, 1980.

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FACTS RELATING TO WHETHER VOLVO FRANCHISEES IN THE RELEVANT MARKET AREA ARE PROVIDING ADEQUATE COMPETITION AND CONVENIENT CONSUMER CARE FOR VOLVO OWNERS IN THE MARKET AREA INCLUDING THE ADEQUACY OF SALES AND SERVICE FACILITIES, EQUIPMENT, SUPPLY OF VEHICLE PARTS, AND QUALIFIED SERVICE PERSONNEL (§3063 (4))

50. Subsequent to assuming responsibility for part of the Palo Alto AOR, Royal hired two more service writers and additional salesmen and also increased its advertising.

51. Royal installed one additional hoist at its service facility at a cost of \$800.

52. Royal added 1 or 2 people in its parts department in an effort to increase its wholesale parts sales into the Palo Alto area. Daily phone calls were made to Palo Alto body shops and wholesale accounts. Royal also sent parts mailers to its wholesale accounts and delivered parts into the Palo Alto area.

53. In the Volvo of America Dealer Action Plan for 1980, Volvo of America projected certain performance levels for Royal. These projections were based upon an additional sales potential of 120 units, representing one-half of the Palo Alto AOR for which Royal had agreed to assume responsibility.^{5/}

5. See Paragraph 16.

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54. Through June of 1980, Royal was performing at the following annualized percentage rates for the categories indicated:

<u>CATEGORY</u>	<u>ANNUALIZED PERCENTAGE OF OBJECTIVE ACHIEVED</u>
New Vehicle Sales	75%
Volvo Accessory Dealer Sales Per New Vehicle Retailed	75%
Volvo Parts Sales	87%
Volvo Labor Sales	94%

55. Volvo of America's standards required Royal to have 10 technicians. The number employed by Royal fluctuated between 7 and 9.

56. Royal has 12 Volvo stalls as required by Volvo of America.

57. Royal had eight of the ten hoists required by Volvo of America and upon Volvo of America's recommendation installed an additional hoist in its service department and one in its body shop.

58. Royal has 44 parking spaces while Volvo of America's standards call for 30.

59. Upon Volvo of America's recommendation, Royal allocated a budget to the Service Manager for good will expenditures.

60. Royal maintains four rental cars and sent mailers to its customers residing in the Palo Alto AOR offering free use of these cars if the customers came in for service.

61. The closure of Premier in San Carlos in May of 1980 resulted in two closed dealerships (Palo Alto and San Carlos). With the closure of the Palo Alto and San Carlos dealerships, Volvo of America does not have a dealership between Sunnyvale and Burlingame, a distance of approximately 26.8 miles.

62. If Carlsen is allowed to operate a Volvo dealership in Palo Alto, the driving distances between the Volvo dealerships will be as follows:

Carlsen to Burlingame Volvo - 19.5 miles

Carlsen to Royal - 7.3 miles

63. There were no facts to indicate that Royal could adequately serve the public in the area north of the proposed new dealer. There were also no facts to indicate that Burlingame Volvo could adequately serve the public in the area which was formerly served by the Palo Alto and Premier dealerships.

FACTS RELATING TO WHETHER THE ESTABLISHMENT OF THE ADDITIONAL
FRANCHISE WOULD INCREASE COMPETITION AND THEREFORE BE IN THE
PUBLIC INTEREST (\$3063 (5))

64. The figures on the following page indicate that Volvo's penetration in the Palo Alto AOR declined from a relatively constant 18 plus % to 10.8% since the Palo Alto Volvo dealership ceased operation. During the same time period, the Sunnyvale (Royal) AOR penetration remained between 18.2% and 20%.

YEAR TO DATE	PALO ALTO AOR*		SUNNYVALE AOR**		COMPETITIVE GROUP REGISTRATION†	
	<u>Volvo Registration</u>	<u>Volvo Market Penetration</u> ⁺⁺	<u>Volvo Registration</u>	<u>Volvo Market Penetration</u>	<u>Palo Alto AOR</u>	<u>Sunnyvale AOR</u>
<u>1978</u>						
Thru September	165	18.2%	154	18.4%	907	838
Thru December	228	18.2	228	20.0	1250	1141
<u>1979</u>						
Thru March	45	18.3	54	18.6	191	290
Thru September	131	15.4	157	18.6	849	842
Thru December	180	14.8	232	19.5	1217	1190
<u>1980</u>						
Thru March	31	10.8	43	18.2	287	236

* The Palo Alto AOR was the area for which Haeckl had primary responsibility.

** The Sunnyvale AOR is the area for which Royal is primarily responsible.

† The competitive group against which Volvo of America measures its sales performance includes Mercedes-Benz, BMW, Audi, Dasher/Scirocco.

++ Volvo's market penetration percentages represent Volvo's shares of the total sales of Volvo of America and the competitive group.

65. Carlsen hired 13 people in anticipation of obtaining the Volvo franchise.

66. The prior Volvo dealerships in Palo Alto have had other franchises in addition to Volvo. These dealerships were not as efficiently run as Royal expects Carlsen to be.

67. For the first quarter of 1980, Royal earned an average gross profit per new Volvo of \$960 compared with the national average of \$962 and the San Francisco District average of \$1110.

DETERMINATION OF ISSUES

Royal has failed to establish that good cause exists for not establishing Carlsen as an additional franchisee. Royal failed to establish that:

1. Royal's permanent investment will be jeopardized;
2. There will be an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area;
3. That it would be injurious to the public welfare for the additional franchise to be established;
4. That the Volvo franchisees in the relevant market area are providing adequate competition and convenient consumer care for the Volvo automobiles in the market area; and that

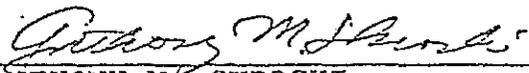
5. The establishment of the additional franchise would not increase competition and therefore would not be in the public interest.

* * * * *

The following proposed decision is respectfully submitted: 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 had before me on the above dates at Sacramento, California, and recommend its adoption as the decision of the New Motor Vehicle Board.

Dated: September 26, 1980.



ANTHONY M. SKROCKI,
Administrative Law Judge
New Motor Vehicle Board