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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
HENSLEY-ANDERSON FORD,)
Protestant,)
vs.)
FORD MOTOR COMPANY,)
Respondent.)

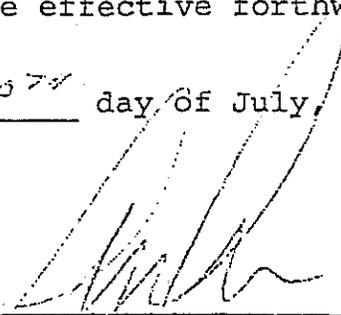
Protest No. PR-481-83

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 20th day of July, 1984.



ALLAN E. CONE
President
New Motor Vehicle Board

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PAGE THIRTY-THREE OF THE Proposed Decision of Administrative Law Judge in the above-entitled matter is hereby modified to include the following:

e) There is no determination that the amount Harley-Davidson pays the Protestants for parts used in the performance of warranty work is reasonable.

As modified, the Proposed Decision 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 29th day of November, 1988.

NEW MOTOR VEHICLE BOARD

By Robert J. Beckus
ROBERT J. BECKUS
Vice-President

A. A. Pierce, Director, DMV
John Lancara, Acting Program Manager
Occupational Licensing, DMV

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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:)
HENSLEY-ANDERSON FORD,) Protest No. PR-481-83
Protestant,)
vs.)
FORD MOTOR COMPANY,) PROPOSED DECISION
Respondent.)
_____)

PROCEDURAL BACKGROUND

1. The Protestant is Hensley-Anderson Ford (Hensley-Anderson), 8625 East Artesia Boulevard, Bellflower, California. Hensley-Anderson has been a franchised Ford Dealer since 1947.

2. In June 1983, Respondent, Ford Motor Co. (Ford) conducted an audit of the warranty reimbursement payments made to Hensley-Anderson for the period of June 1982 through June 1983.

3. As a result of the audit, Ford charged back \$24,891 of the warranty and transportation damage claims paid. Of this sum \$20,769.21 remains in dispute.

ISSUES PRESENTED

4. On September 26, 1983, Hensley-Anderson filed a protest pursuant to Vehicle Code 1/ Section 3065 alleging that:

A. THE METHODS USED BY FORD TO REVIEW WARRANTY CLAIMS OVER A ONE YEAR PERIOD AND THE CONCLUSIONS REACHED FROM THAT REVIEW WERE UNREASONABLE, ARBITRARY AND CAPRICIOUS.

B. FORD'S WARRANTY AUDIT PROCEDURES WERE UNREASONABLE, ARBITRARY AND CAPRICIOUS AND WERE APPLIED IN AN UNREASONABLE AND DISCRIMINATORY MANNER.

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

C. FORD FAILED TO COMPENSATE HENSLEY-ANDERSON ADEQUATELY AND FAIRLY FOR LABOR AND PARTS USED BY HENSLEY-ANDERSON TO FULFILL FORD'S WARRANTY OBLIGATIONS.

D. FORD VIOLATED SECTION 3065(d) IN NOT DISAPPROVING WITHIN 30 DAYS OF PRESENTATION ANY OF THE CLAIMS PAID DURING THE TWELVE (12) MONTH PERIOD ENDING JUNE 1983 WHICH WERE SUBSEQUENTLY CHARGED BACK AS A RESULT OF THE 1983 AUDIT.

E. FORD VIOLATED SECTION 3065(d) IN FAILING TO PROVIDE WRITTEN GROUNDS FOR DISALLOWANCE, WITHIN THIRTY (30) DAYS OF PRESENTATION OF CLAIMS PAID DURING THE TWELVE (12) MONTH PERIOD ENDING JUNE 1983 WHICH WERE SUBSEQUENTLY CHARGED BACK AS A RESULT OF THE 1983 AUDIT.

5. A hearing was held before Gerald D. Langle, Administrative Law Judge for the Board, on March 29, 30, April 2, 3, 4 and 5, 1984.

6. Hensley-Anderson was represented by Margaret L. Raynor, and Larry Peterson of the law firm of Atkinson and Atkinson. Ford was represented by Lassie M. Wildern, Office of the General Counsel, Ford Motor Company.

APPLICABLE STATUTORY PROVISIONS

7. Vehicle Code Section 3065 in relevant part provides:

(a) Every Franchisor shall properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill such warranty when the franchisee has fulfilled warranty obligations of repair and servicing and shall file a copy of its warranty reimbursement schedule or formula with the board. The warranty reimbursement schedule or formula shall be reasonable with respect to the time and compensation allowed the franchisee for the warranty work and all other conditions of such obligation. The reasonableness thereof shall be subject to the determination of the board; provided that a franchisee files a notice of protest with the board.

(b) (not applicable)

(c) If any franchisor disallows a franchisee's claim for a defective part, alleging that such part, in fact, is not defective, the franchisor shall return such part so alleged not to be defective to the franchisee at the expense of the franchisor, or the franchisee shall be reimbursed for the franchisee's cost of the part, at the franchisor's option.

(d) All such claims made by franchisees hereinunder shall be either approved or disapproved within 30 days after their receipt by the franchisor. When any such claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within such period, and each notice shall state the specific grounds upon which the disapproval is based. All claims made by franchisees under this section and Section 3064 for such labor and parts shall be paid within 30 days following approval. Failure to approve

or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, shall not constitute a violation of this article.

PROVISIONS OF THE FORD/HENSLEY-ANDERSON SALES AND SERVICE AGREEMENT CITED BY THE PARTIES

8. The Ford/Hensley-Anderson Sales and Service Agreement dated June 1, 1972, provided:

4.(b) Warranty and Policy and Campaign Service.

(4) The Dealer shall submit claims to the Company for reimbursement for the parts and labor used in performing warranty, policy and campaign work and the Company shall reimburse the Dealer therefor, in accordance with the provisions of the Warranty Manual or campaign instructions and the Dealer's approved warranty labor rate. The Dealer shall maintain adequate records and documents supporting such claims in accordance with the provisions of the Warranty Manual.

12.(b) Inspections and Tests.

The Dealer shall allow persons designated by the Company, at reasonable times and intervals and during normal business hours, to examine the DEALERSHIP FACILITIES and OPERATIONS, the Dealer's stocks of COMPANY PRODUCTS and used vehicles and vehicles at the DEALERSHIP FACILITIES for service or repair to test the Dealer's equipment, to check and instruct the Dealer and his employees in the proper handling of warranty and other repairs and claims based thereon, and to examine, copy and audit any and all of the Dealer's records and documents. The Company may charge back to the Dealer all payments or credits made by the Company to the Dealer pursuant to such claims or otherwise which were improperly claimed or paid.

PROVISIONS OF THE WARRANTY AND POLICY MANUAL FOR AUTHORIZED
FORD AND LINCOLN MERCURY DEALERS CITED BY THE PARTIES

9. Subject 3.1, Page 2 of the September 1979 Ford Warranty and Policy Manual ^{2/} provided in part:

The total time spent on warranty labor must be recorded on the repair order for each vehicle, regardless of the number or type of repairs performed, as explained in this procedure.

10. In 1980 Ford changed its time recording requirements. Previously all dealers were required to use a time recording procedure in connection with all warranty repairs whether measured time or standard (flat-rate time) time.^{3/} After the change only those dealers specially selected by Ford were required to clock standard time.

^{2/} Hereinafter the Ford Warranty and Policy Manual will be referred to as the manual.

^{3/} The labor charges for repairs performed are determined by either charging a flat-rate time or actual measured time. A flat-rate operation is a repair for which a standard labor charge is made based on the standard found in the operation manual. A measured time operation is a repair for which the claim made is based on the actual time spent on the repair. Which system is permitted for any particular operation is determined by Ford.

11. Subject 3.0, Page 1 of the September 1982 manual provides in part:

All dealerships must time record actual time operations required to perform warranty/policy repairs. In addition, selected dealerships must also time record standard operations (operations listed in the Ford Service Labor Time Standards Manual) when, in the Company's opinion, entire claim time recording is needed to improve warranty administration practices . . .

12. Subject 3.0, Page 3 of the September 1982 manual provides in part:

The foregoing time recording procedures are a labor control requirement only. These procedures do not alter the reimbursement provisions of this Manual as they apply to standard operations; that is, the standard operations will be reimbursed provided the time recorded supporting them is fair and realistic.

PROVISIONS OF THE WARRANTY AUDIT PROGRAM CITED BY THE PARTIES

13. Included in the audit package given to the auditor assigned to conduct the Hensley-Anderson audit was the Ford Warranty Program Form No. W-1. The form contains a standard checklist used by Ford auditors in conducting a dealership audit. Page 1 provides in part:

I. GENERAL OBJECTIVES

. To determine:

- The propriety and reasonableness of warranty and policy claims submitted to the Company by Ford and Lincoln-Mercury dealerships and various fleet accounts.

- The adequacy of warranty administrative procedures followed by dealers and fleet accounts.

. To ensure that dealers and fleet accounts are complying with the terms and conditions specified in the Warranty and Policy Manual and with the Ford Parts and Service Division's published procedures.

. To recommend disallowance of items that do not comply with the above requirements.

14. Form No. W-1 also provides a worksheet for the auditor to be used in connection with a visual inspection of customer vehicles to ascertain whether work claimed was actually performed.

FINDINGS OF FACT

I. FACTS PERTAINING TO WHETHER FORD VIOLATED SECTION 3065(a).

A. WHETHER THE METHODS USED BY FORD TO REVIEW HENSLEY-ANDERSON'S WARRANTY CLAIMS AND THE CONCLUSIONS REACHED FROM THAT REVIEW WERE UNREASONABLE, ARBITRARY AND CAPRICIOUS.

FINDINGS:

15. Ford has established what it calls the "Ford Warranty Measurement System". One of its functions is to serve as a basis for comparing a particular dealership's warranty repair costs with that of other dealers. It is also used by Ford to determine whether a dealership is experiencing problems in the procedural aspects of warranty claim administration.

16. The Warranty Measurement System in effect prior to and at the time of the audit in question utilized what was called a "standard" warranty expense as a benchmark. A standard was established for each car line by comparing the total national

sales of each car line over a rolling 12 month period with the total warranty cost for each car line during that same period. The national median warranty cost per car line was the "standard" warranty cost.

17. The warranty claims of each Ford dealer throughout the country (using the dealer's sales and repair costs per car line) were then compared with the "standard" and the dealers were classified as being in one of three categories:

- . standard dealers -- those dealers at or below standard
- . over-standard dealers -- those dealers less than 30% over standard
- . high over-standard -- those dealers more than 30% over standard.

18. The comparison of a dealership to standard was sometimes used by Ford to determine whether the dealership's warranty practices and procedures would be reviewed.

19. In 1978, Leonard Raynor, President of Hensley-Anderson, became aware that Hensley-Anderson had been classified as an "over-standard" dealer. As a result, Raynor requested that Ford conduct what Ford calls a

"warranty practices review". A warranty practices review is a study done to assist a dealership in reducing its warranty costs and is not an audit.

20. In August 1978, in response to Raynor's request, William Kremer, a Ford Audit Specialist, came to the dealership and conducted the warranty practices review. Kremer made specific recommendations to Raynor which Raynor implemented.

21. At the request of Raynor, Kremer made a follow-up visit to the dealership in April 1979.

22. In June 1979, Hensley-Anderson was notified that Ford intended to audit the dealership. The audit did not take place due to scheduling conflicts.

23. Subsequent to Kremer's review and follow-up visit, John Bonnel, Ford's Parts and Service Division's District Manager, sent a letter in February 1980, to Hensley-Anderson stating that Hensley-Anderson had been selected as a dealer which would be required to clock flat-rate as well as measured time repairs. (See para. 10 supra.)

24. In April 1980, approximately two (2) months after the clocking letter from Bonnel was sent, a second follow-up visit was made by Kremer. The result of this review was a contact

report made by Kremer which contained a list of recommendations for Hensley-Anderson to implement to improve its warranty administration.

25. Ford's Sales and Service Agreement contains a provision allowing warranty audits of dealers. Ford, relying upon this provision, notified Hensley-Anderson in June 1983, that the audit which is the subject of this protest would be conducted.

CONCLUSION

26. Ford's actions in reviewing Hensley-Anderson's warranty claims and in determining to conduct an audit were not unreasonable, arbitrary or capricious.

B. WHETHER FORD'S AUDIT PROCEDURES WERE UNREASONABLE, ARBITRARY AND CAPRICIOUS AND WERE APPLIED IN AN UNREASONABLE AND DISCRIMINATORY MANNER.

FINDINGS:

27. Based upon Ford's classification of Hensley-Anderson under the Ford Warranty Measurement System as an over-standard dealer Ford selected Hensley-Anderson for the subject audit.

28. The audit was conducted during the period of June 27 through July 1, 1983, and covered both warranty claims and transportation damage claims submitted between the period of June 1982 through June 1983. The audit was conducted by Stephen Tarshis, a Ford Warranty Auditor, with the full cooperation of the dealership.

29. Ford's stated purposes of an audit are:

1) to determine the propriety and reasonableness of the claims submitted by the dealer; and

2) to determine whether the claims were submitted in compliance with the terms and conditions of the warranty and policy manual.

30. Ford admitted that the purpose of the audit of Hensley-Anderson was limited only to the second of the above purposes . . . "whether the claims were submitted in compliance with the terms and conditions of the warranty and policy manual." No attempt was made by Ford's auditors to determine whether Hensley-Anderson had in fact performed the work claimed.

31. The audit covered all warranty and transportation damage claims submitted by the dealer and paid by Ford for a twelve (12) month period ending June 1983. However, rather than reviewing each warranty claim submitted, a statistical sampling procedure was used. Approximately 2400 claims had been submitted during the twelve (12) month period.^{4/} Of these, 500 were randomly chosen and used as the sample. Hensley-Anderson introduced no evidence challenging the sampling procedure.

32. The claims within the sample were each reviewed for conformance with the requirements of the warranty and policy manual. Any claim which did not conform to the manual was disallowed in whole or in part depending upon the discrepancy.

33. The dollar amounts of the disallowances were totaled and divided by the number of claims in the sample. This yielded an "average error" per claim which was then multiplied by the total number of claims in the universe which resulted in a "total estimated disallowance". Twenty percent was then

^{4/} All the claims submitted by Hensley-Anderson and paid by Ford for the twelve (12) month period ending June 1983 are referred to as the "universe" of claims encompassed by the audit.

deducted for possible variations in the sample from the universe of claims and the result was the "recommended disallowance". Hensley-Anderson introduced no evidence challenging the statistical or mathematical computations.

34. Transportation damage claims were not included in the sample. Each transportation damage claim submitted during the twelve month period was scrutinized on a claim by claim basis to ascertain whether the manual's requirements had been met.

35. The auditor gathered information from Ford's Michigan offices and local Ford representatives prior to the start of the audit. This included records of vehicles repaired by Hensley-Anderson and a number of reports as to the warranty history of the dealership including the most current warranty trend analysis.

36. Ford's Audit Manual requires that the auditor complete two forms called W-1 (Warranty Claims) and W-2 (Transportation Damage Claims). W-1 and W-2 contain detailed instructions for the auditor to follow and a requirement that the auditor certify the instructions have been carried out. W-1 includes as an objective of the audit that the audit is to determine

"the propriety and reasonableness" of the claims submitted. W-2 includes as an objective of the audit that the audit is "to determine that repairs . . . were actually performed . . ."

37. Although both W-1 and W-2 were included in the auditor's work papers, they were never referred to by the auditor and not used in determining whether to charge back the claims. The forms were characterized as merely busy work and unnecessary for the purposes of the audit. Although both forms contain instructions as to procedures to verify whether the work was done, the instructions were not followed and no additional steps were taken to verify "the propriety and reasonableness" of the claims or "to determine that repairs . . . were actually performed."

38. Upon conclusion of the audit, the auditor met with dealership personnel, Leonard Sickman, Vice President and General Manager, and Donald Burton, Service Manager. The avowed purpose of the meeting was to inform the dealership of the claims disallowed, the reasons therefore and to allow the dealership personnel to bring up unusual or extenuating circumstances relating to the claims.

39. The majority of the claims disallowed were for improper time clocking. The auditor made it clear that although he was willing to discuss time clocking procedures, he was not willing to reverse the disallowances based on improper time clocking. Sickman and Burton believed that all of the disallowed claims were as a result of improper time clocking. Having been apprised as to the auditor's intransigent position in regard thereto, neither believed that bringing up extenuating circumstances would be fruitful.

40. A final meeting was held between the auditor, Ford's Parts and Service Division District Manager, Raynor and other dealership personnel. This meeting dealt only with the general reasons for disallowance of the claims. The individual claims were not discussed. The auditor's field report was reviewed and Raynor expressed his disagreement with the chargebacks.

41. Of the 485 warranty claims reviewed, 143 were disallowed in whole or in part by the auditor. The sum total of the warranty disallowances was extrapolated and a warranty chargeback of \$23,658 was made. The transportation damage claims audited resulted in an additional chargeback of \$1,233 for a total of \$24,891. This sum was paid by Hensley-Anderson under protest.

42. The parties resolved some of their differences prior to the hearing, leaving a total of \$20,769.21 in dispute and before the board at this time.

CONCLUSIONS

43. Ford's warranty audit procedures were not unreasonable, arbitrary or capricious nor applied in an unreasonable or discriminatory manner in regard to the sampling or in regard to whether Hensley-Anderson had complied with Ford's required procedures.

44. However, Ford's admitted failure to follow its own standard warranty audit program was unreasonable.

C. WHETHER FORD FAILED TO COMPENSATE HENSLEY-ANDERSON ADEQUATELY AND FAIRLY FOR LABOR AND PARTS USED BY HENSLEY-ANDERSON TO FULFILL FORD'S WARRANTY OBLIGATIONS.

1. WHETHER FORD HAS THE RIGHT TO CHARGEBACK FOR VIOLATIONS OF THE WARRANTY AND POLICY MANUAL.

FINDINGS:

45. Under the terms of Ford's Sales and Service Agreement the dealer agrees to "maintain adequate records and documents supporting such claims in accordance with the provisions of the Warranty Manual."

46. Ford's Warranty and Policy Manual provides information to dealerships concerning new car warranty and sets forth responsibilities of dealerships under new car warranty. Ford's stated functions of the Warranty and Policy Manual are:

1) to guarantee that the consumers receive the warranty services they are entitled to by establishment of a uniform guide for dealers and;

2) to explain information on record keeping and other procedural items with which the dealer is required to comply in submitting warranty claims.

47. Warranty claims sent in by dealerships and processed by Ford are accepted in a good faith belief that work claimed was done and the manual was followed. The manual's requirements for a dealership's record keeping and claim submission are intended by Ford to be a check on the credibility of the claim.

48. Under the terms of the Sales and Service Agreement, Ford, "may charge back to the dealer all payments or credits made by the company to the Dealer pursuant to such claims or otherwise which were improperly claimed or paid."

49. Ford failed to provide a definition for the language "improperly claimed or paid" when used to describe a claim submitted by a dealership.

CONCLUSION

50. Pursuant to the Sales and Service Agreement Ford has the right to charge back for violations of the Warranty and Policy Manual.

2. WHETHER THE REFUSAL OF FORD TO CONSIDER WHETHER HENSLEY-ANDERSON HAD IN FACT PERFORMED THE WORK WAS UNREASONABLE.

FINDINGS:

51. Ford's sole reason for the chargeback was the failure of Hensley-Anderson to comply with certain requirements of the Warranty and Policy Manual.

52. The majority of the claims disallowed were due to Hensley-Anderson's failure to follow the time recording procedures allegedly required by Ford. These claims were charged back because of either improper time recording or no time recording at all.