



DECISION COVER SHEET

ACTION BY: Public Members Only

ACTION BY: All Members

To : BOARD MEMBERS

Date: January 23, 2014

From : ADMINISTRATIVE LAW JUDGE: Anthony M. Skrocki

CASE: STOCKTON AUTOMOTIVE DEVELOPMENT LLC dba STOCKTON NISSAN v. NISSAN NORTH AMERICA, INC.
Protest No. PR-2351-12

TYPE: Vehicle Code section 3060 - Termination Protest

PROCEDURE SUMMARY:

- PROTEST FILED ON CALENDAR: November 15, 2012
- MOTION FILED: Board issued Order to Show Cause Why Protest Should Not Be Dismissed for Lack of Jurisdiction
- COUNSEL FOR PROTESTANT: Michael J. Flanagan, Esq.
Gavin M. Hughes, Esq.
Law Offices of Michael J. Flanagan
- COUNSEL FOR RESPONDENT: Maurice Sanchez, Esq.
Kevin M. Colton, Esq.
Baker & Hostetler LLP

EFFECT OF PROPOSED ORDER:

The Proposed Order would dismiss the protest for lack of jurisdiction.

SUMMARY OF PROPOSED ORDER:

- It is uncontested that:
 - At the time the notice of termination was issued and the protest filed (November, 2012), the Board had jurisdiction to hear the protest as there was a franchise in existence with Protestant the franchisee and Respondent the franchisor;
 - On October 1, 2013, almost a year later, Protestant executed a “Voluntary Termination Letter”, a document required by Respondent in connection with obtaining Respondent’s approval of a buy-sell between Protestant and the Lithia Group;
 - The Voluntary Termination Letter, by its terms, was to become effective “concurrent” with a new franchise to be executed between Respondent and the Lithia Group;
 - Respondent approved the buy-sell and a new franchise was executed between

Respondent and the Lithia Group on October 1, 2013;

- Both sides agreed that the Voluntary Termination Letter was effective to terminate Protestant's franchise and there is no need for (or right to) a hearing as to whether there is good cause for termination of the franchise; and,
- Both sides agreed that the Board no longer has jurisdiction over the protest and agreed that the issue of whether there is good cause for termination is moot.
- The usual practice of parties before the Board under such circumstances is for the Respondent to withdraw its notice of termination and for Protestant concurrently to request dismissal of the protest. The Board's Executive Director would then issue an order of dismissal of the protest without the need for any action by the Board itself.
- In the present case, despite the above:
 - Respondent refused to withdraw its notice of termination unless Protestant executed a settlement agreement and release of all claims that would bar any civil actions between the parties; but,
 - Protestant refused to execute such an agreement; and,
 - Protestant refused to request dismissal of its protest unless Respondent withdrew its notice of termination, which Respondent refused to do unless Protestant executed the settlement agreement and release; and,
 - Even if Protestant requested dismissal of its protest, Respondent will refuse to withdraw its notice of termination.
- The ALJ initially attempted to resolve the dispute informally during a telephonic conference with counsel during which they agreed that the dispute was moot but refused to agree as to a procedure that would lead to a dismissal of the protest without formal Board action. The ALJ informed counsel that in addition to the issue of mootness, if the franchise had already been terminated it was likely the Board no longer had jurisdiction over the matter.
- After the failed attempt to resolve the dispute informally, and with each side refusing to act without a Board Order, the ALJ issued an Order to Show Cause ("OSC") why the protest should not be dismissed for lack of jurisdiction, a determination that could be made by the Board regardless of the inaction of the parties. The parties submitted their briefs and a hearing on the OSC was held.
- During the hearing on the OSC:
 - Both sides agreed that the franchise terminated as of October 1, 2013, when a new franchise was entered into between Respondent and the Lithia Group, the buyer in the buy-sell;
 - Both sides agreed that the issue of whether there is good cause to terminate the

franchise is moot and also that the Board no longer has jurisdiction over the protest.

- Respondent contended "... Protestant has consented to the termination of the Nissan franchise after receipt of the Notice of Termination, as set forth in Vehicle Code section 3060(a)(3)." (Respondent's Reply, p. 2, lines 19-23) and that since the parties agree the Board has no jurisdiction the Board is limited to issuing an Order of Dismissal that reads, "simply 'Dismissed.'" (Respondent's Reply, pp. 2-3)
- Protestant agreed that the protest should be dismissed due to lack of jurisdiction but asserts that, "... the Board, contrary to Respondent's claims, is empowered to issue a comprehensive Order of Dismissal, setting forth all of the undisputed facts and substantial evidence contained in the declarations submitted by the parties. Protestant urges that the Board must do so, in order to avoid a misleading or misinterpreted understanding of what occurred in this case..." (Protestant's Reply, p. 2, lines 16-23)
- The ALJ concluded that the Board's jurisdiction and powers were created by the legislature and cannot be curtailed by agreement of the parties.
- The ALJ also concluded that the Board had the power to determine its own jurisdiction and that dismissal for lack of jurisdiction could occur regardless of whether Respondent refused to withdraw its notice of termination or Protestant refused to request dismissal of its protest.
- Therefore, regardless of the concurrence of counsel, it was necessary to analyze the facts and apply the law to determine how and why the Board would cease to have jurisdiction when it initially had jurisdiction.
- The ALJ found that the Voluntary Termination Letter signed in behalf of Protestant on October 1, 2013, was effective to terminate the franchise.
- The ALJ found that because there was no longer a "franchise", Protestant was no longer a "franchisee" and Respondent was no longer the "franchisor", all of which are defined by the Vehicle Code and necessary for the Board to have the power to hear and decide a protest.
- As to whether the franchise terminated pursuant to Section 3060(a)(3) as urged by Respondent, the ALJ found that the Voluntary Termination Letter was just what it said it was, a voluntary termination by Protestant (the "franchisee") conditioned only upon the execution of a new franchise between Lithia Group and Respondent, and that the Voluntary Termination Letter was not consent pursuant to Section 3060(a)(3) that would permit termination by Respondent (the "franchisor") pursuant to Section 3060.
- The ALJ found that the jurisdiction of the Board ceased on October 1, 2013, when the Voluntary Termination Letter became effective to terminate the franchise, and the ALJ is recommending that the Protest be dismissed for lack of jurisdiction.

RELATED MATTERS:

- Related Case Law: None
- Applicable Statutes and Regulations: Vehicle Code sections 331, 331.1, 3050(d), and 3060.