

1507 - 21st Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888
Contact Person: Eugene Ohta
www.nmvb.ca.gov

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD
MINUTES

The New Motor Vehicle Board ("Board") held a Special meeting on August 27, 2015, in Hearing Room #1, at the Board's offices.

2. **ROLL CALL**

Glenn Stevens, President and Public Member, called the meeting of the Board to order at 12:13 p.m.

Present: Anthony A. Batarse Jr. William G. Brennan, Executive Director
Kathryn Ellen Doi Robin P. Parker, Senior Staff Counsel
Bismarck Obando Danielle R. Vare, Staff Counsel
Victoria Rusnak
Glenn E. Stevens

Absent: Ramon Alvarez C.
Ryan L. Brooks
Rahim Hassanally
David C. Lizárraga

3. **PLEDGE OF ALLEGIANCE**

Ms. Doi led the members and staff in the Pledge of Allegiance.

4. **INTRODUCTION AND WELCOME OF RECENTLY APPOINTED DEPUTY SECRETARY AND GENERAL COUNSEL FOR THE CALIFORNIA STATE TRANSPORTATION AGENCY, ALICIA M. B. FOWLER - BOARD DEVELOPMENT COMMITTEE**

Mr. Stevens welcomed Alicia Fowler, Deputy Secretary and General Counsel for the California State Transportation Agency. Bill indicated that Alicia is very familiar with the Board having successfully represented it in the past while working at the Attorney General's Office. Ms. Fowler indicated that she is familiar with the issues before the Board and how important they are to the State of California, dealers, and manufacturers. She indicated that the Transportation staff is there to help and assist in any way they can.

Furthermore, Ms. Fowler indicated she could act as a liaison to get information for the Board from other departments within Transportation and bring forth issues.

5. **ORAL PRESENTATION BEFORE THE PUBLIC MEMBERS AND DEALER MEMBERS OF THE BOARD**

Mr. Stevens indicated that counsel for both parties stipulated to allow Dealer Member participation. Additionally, he read the following statement "comments by the parties or by their counsel that are made regarding any proposed decision, ruling, or order must be limited to matters contained within the administrative record of the proceedings. No other information or argument will be considered by the Board."

FUN BIKE CENTER v. BOMBARDIER RECREATIONAL PRODUCTS, INC.: BRP US INC.
Protest No. PR-2405-14

Oral comments were presented before the Public Members and Dealer Members of the Board. Michael M. Sieving, Esq. represented Protestant. R. Bryan Martin, Esq. of Haight Brown & Bonesteel LLP represented Respondent.

6. **CLOSED EXECUTIVE SESSION DELIBERATIONS**

Pursuant to Government Code section 11126(c)(3), Vehicle Code section 3008(a), and Title 13, California Code of Regulations, sections 581 and 588, the Board convenes in closed Executive Session to deliberate the decisions reached upon the evidence introduced in proceedings that were conducted in accordance with Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Pursuant to Government Code section 11517(c)(2), the Board could adopt the proposed decision, make technical or other minor changes, reject the proposed decision and remand the case, or reject the proposed decision and decide the case upon the record.

CONSIDERATION OF PROPOSED ORDER

FUN BIKE CENTER v. BOMBARDIER RECREATIONAL PRODUCTS, INC.: BRP US INC.
Protest No. PR-2405-14

Consideration of the Administrative Law Judge's Proposed Order Granting Respondent's Post-Discovery Motion to Dismiss, by the Public Members and Dealer Members of the Board.

The Public Members and Dealer Members of the Board deliberated in closed Executive Session. Ms. Doi moved to adopt the Administrative Law Judge's

Proposed Order. Mr. Stevens seconded the motion. The motion carried by a 4-to-1 vote with Ms. Rusnak dissenting.

7. **OPEN SESSION**

The Public Members and Dealer Members returned to Open Session. Ms. Parker announced the decision in *Fun Bike Center* and indicated that the Decision with dissent would be finalized around September 17, 2015.

8. **DISCUSSION AND CONSIDERATION OF PUBLIC COMMENTS RECEIVED AFTER THE 15-DAY NOTICE ON THE BOARD'S PROPOSED RULEMAKING CONCERNING SANCTIONS (13 CCR § 551.21) - POLICY AND PROCEDURE COMMITTEE**

The members were provided with a memorandum from Bill Brennan, Robin Parker, and Danielle Vare concerning the public comments submitted by the Alliance of Automobile Manufacturers and the California New Car Dealers Association. Ms. Parker indicated that the comments pertain to proposed amendments to Section 551.21 of Title 13 of the California Code of Regulations regarding sanctions. A 15-day notice was issued for public comment. The comments and Board response, as indicated in the memo, are as follows:

Alliance of Automobile Manufacturers ("Alliance"):

On July 2, 2015, the Board received public comments from the Alliance. The Alliance believes that amending Section 551.21 is "both unnecessary and needlessly imposes a level of detail far beyond that which is even applicable in typical civil cases." Furthermore, since the June 17 proposed amendments address a situation that only occurred once, "this section clearly does not carry with it a long history of troublesome results and impacts that would give rise to such a substantial modification of the current regulation. It is based wholly on a case of first-blush consideration." Given there are dealers on the Board even though they do not participate in protests, the Alliance contends that "...there is substantial opportunity for the cultivation of certain perspectives and sympathies among Board member peers", which have no place in adjudicating a legal dispute. Since the proposed amendments are punitive measures, the Alliance "hopes that such changes are the result of only long-held, clearly established deficiencies in the current system. Neither of which are present here."

The Alliance also commented on Section 551.22, which pertains to Proposed Stipulated Decisions and Order ("PSDO") and closely mirrors Vehicle Code section 3050.7. The Alliance suggested additional language allowing for oral argument by parties should a PSDO be brought before the Board due to a member's objection. According to the Alliance, fairness dictates that given the parties have mutually agreed to the PSDO there should be an opportunity for the parties to address the Board members' questions.

Response:

In an effort to address the Alliance's comments, the staff proposes going back to the version of Section 551.21 that was originally noticed for public comment on February 6, 2015. There were no public comments received regarding this version and it still addresses a number of inconsistencies identified by the McConnell Chevrolet Buick motion.

The suggestion regarding Section 551.22 is unnecessary since public comments are allowed and encouraged throughout the Board's meetings except on Proposed Orders/Decisions/Rulings pursuant to the Bagley-Keen Open Meeting Act (Gov. Code § 11120, et seq.).

California New Car Dealers Association ("CNCDA") Comments:

On July 2, 2015, the CNCDA submitted public comments for the proposed amendments to Section 551.21. In particular, the CNCDA took issue with the "substantial justification" standard used to determine whether a party's actions or tactics are misuses of the discovery process. The CNCDA recommends a "reasonable justification" standard be used in this context because it is a more commonly used standard and "has been tested many times in a variety of legal settings." The higher standard proposed by the Board could, according to the CNCDA, result in too great of a burden being placed on the parties. According to the CNCDA, "[s]anctions are serious, and should be reserved for truly problematic, deliberate and unacceptable behavior. Otherwise, zealous advocacy of a client's interests can be unduly suppressed due to the chilling effect of potential sanctions for being 'wrong,' despite having a reasonable justification for conduct or arguments." The CNCDA maintains that "substantial justification" is not defined and subject to ambiguity. It urges the Board to adopt the "reasonable justification" standard because it is more appropriate for sanctions and provides the most clarity to all parties.

Response:

The standard of "substantial justification" has long been a part of the Board's statutes in Vehicle Code section 3050.2, which states the powers and duties of the board. Specifically, Section 3050.2(b) states, in part, "...The executive director may, at the direction of the board, upon a failure to comply with authorized discovery without substantial justification for that failure, require payment of costs incurred by the board, as well as attorney's fees and costs of the party who successfully makes or opposes a motion to compel enforcement of discovery..." (Underline added.)

In addition, this standard has been described and subsequently upheld in California Appellate Court, specifically in the case of *Nader Automotive01*

Group, LLC v. New Motor Vehicle Bd. (2009) 178 Cal.App.4th 1478, 1480, 1483. In the Nader case, the dealer claimed that Vehicle Code section 3050.2 was unconstitutional because it gave no standard which the Administrative Law Judge could apply. However, the Court disagreed stating that, just like Vehicle Code section 3050.2, Code of Civil Procedure section 2031.310(h) used a "substantial justification" standard. This section provided the Board staff guidance in drafting the June 17 proposed amendments. The Nader court also pointed out the case of *Tetra Pak, Inc. v. State Bd. of Equalization* (1991) 234 Cal.App.3d 1751, which interpreted the standard to mean "the entity's position in the proceedings was clearly reasonable, i.e., it had a reasonable basis in law and fact." (Id. at 1763) Ultimately, the Nader court found the "substantial justification" standard in Vehicle Code section 3050.2 to be constitutional.

Given the long-standing history and authority stated above, the staff proposes the Board not make any changes in response to CNCDA's comments.

Ms. Doi suggested that the discussion of this matter and Agenda item 9 be taken together.

Mr. Obando moved to adopt the staff's recommended response to the public comments. Ms. Doi seconded the motion. The motion carried unanimously.

9. **CONSIDERATION OF REVISED TEXT TO PROPOSED RULEMAKING CONCERNING SANCTIONS (13 CCR § 551.21) - POLICY AND PROCEDURE COMMITTEE**

The members were provided with a memorandum from Bill Brennan and Robin Parker regarding revised text to proposed rulemaking concerning sanctions. Ms. Parker indicated that in response to the public comments, the sanctions regulation was being revised. Initially, the staff suggested that all of the amendments approved at the June 17 meeting be deleted including all references to misuses of the discovery process as well as clarifying changes. However, after further consideration and in consultation with the Policy and Procedure Committee, Ms. Parker proposed an alternative that maintained changes to subsections (j) and (k) pertaining to the payment of attorney's fees and expenses.

A clean version of the proposed text without strikeout, underline font follows:

§ 551.21. Sanctions.

(a) In any proceeding before the board or an ALJ, no party or representative of a party shall engage in or participate in any actions or tactics that are frivolous, or that are intended to cause or will result in unnecessary delay.

(b) For purposes of this section, "party" or "representative of a party" includes, but is not limited to, a party's officer, director, managing agent,

dealer principal or the equivalent, or their attorney.

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the failure to comply with a lawful order or ruling of the board or an ALJ, including a failure to comply timely with a pre-hearing conference order or discovery order.

(2) "Frivolous" includes, but is not limited to:

(A) Totally without merit as there is an absence of reasonable support, under the facts or law, for making or opposing the motion(s), or for the failure to comply; or

(B) For the purpose of harassing an opposing party or counsel.

(C) Actions or tactics, whether consisting of affirmative conduct or failure to act or respond, that will result or do result in unnecessary delay or costs, or are otherwise not in good faith.

(c) A party asserting a violation of this section may, by way of written motion in compliance with Article 1, section 551.19, or oral motion made on the record during reported proceedings, request that the board or an ALJ recommend that the board impose sanctions upon a party, or party's representative, or both.

(d) An ALJ presiding over the matter who believes there has been a violation of this section may on his or her own initiative recommend that the board impose sanctions upon a party, or party's representative, or both.

(e) The board shall not order sanctions, or an ALJ shall not recommend an award of sanctions, without providing the party or party's representative against whom sanctions are sought notice and an opportunity to be heard.

(f) The board or ALJ shall make determinations as to whether the actions or tactics were frivolous based upon the administrative record and any additional testimony or documentary evidence presented.

(g) Any proposed order recommending sanctions by the ALJ or board order imposing sanctions shall be on the record, or in writing, setting forth the factual findings on which the recommended or board ordered sanctions are based, as well as setting forth the factual findings as to the reasonableness of the sanctions, including the reasonableness of any amount(s) to be paid.

(h) A proposed order recommending an award of sanctions shall be considered by the board members at their next regularly scheduled meeting. A determination not to award sanctions shall not be considered by the board members and is final upon issuance by the ALJ.

(i) The board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

(j) If the motion for sanctions is granted, the board may order or an ALJ may recommend that the party or party's representative or both pay the movant's reasonable expenses and attorney's fees incurred in bringing and pursuing the motion. However, payment of attorney's fees and expenses will not be ordered if:

(1) The movant filed the motion before attempting in good faith to obtain compliance by the opposing party without board action;

(2) The opposing party's noncompliance, nondisclosure, response, or objection was substantially justified; or

(3) Other circumstances make an award unjust.

(k) If the motion for sanctions is denied, the board may order or an ALJ may recommend, after giving an opportunity to be heard, the movant or movant's representative or both to pay the party or party's representative who opposed the motion reasonable expenses and attorney's fees in opposing the motion for sanctions as well as bringing and pursuing the motion for expenses and attorney's fees. However, payment of attorney's fees and expenses will not be ordered if the motion for sanctions was substantially justified or other circumstances make an award unjust.

(l) If the motion for sanctions is granted in part and denied in part, the board may order or an ALJ may recommend that an award of reasonable expenses and attorney's fees incurred in connection with bringing or opposing the motion be apportioned.

Note: Authority cited: Section 3050(a), Vehicle Code. Reference: Sections 128.5, 2023.010, 2023.020, 2023.030, and 2023.040, Code of Civil Procedure; Section 11455.30, Government Code; and Section 3050.2, Vehicle Code.

Mr. Stevens moved to adopt the revised text to proposed rulemaking concerning sanctions. Ms. Rusnak seconded the motion. The motion carried unanimously.

Mr. Stevens read the following statement into the record:

Given the Board's decision to go forward with the proposed regulations, I hereby delegate to the Executive Director the ministerial duty of proceeding through the rulemaking process in compliance with the Administrative Procedure Act. Notice of the proposed rulemaking will be published in the California Regulatory Notice Register and will be sent to the Public Mailing List. During the public comment period, I want to invite and encourage written and oral comments. Additionally, a public hearing at the Board's offices may be held to accept oral and written comments.

By the Board instructing staff to go forward with the proposed regulations, this does not necessarily indicate final Board action. If any written or oral comments are received, the full Board will consider the comments and reconsider the text of the proposed regulations. Furthermore, if the staff decides that substantive modifications to the proposed text are necessary, the Board will consider those modifications at a noticed meeting. However, non-substantive changes involving format, grammar, or spelling suggested by the Office of Administrative Law or the staff will not be considered by the Board because they are non-regulatory in nature. They will be considered by the Executive Committee and ultimately reported to the Board at a future meeting. If there are no written or oral comments received, then the rulemaking process will proceed without further Board involvement.

(After the Board meeting, non-substantive changes were made to the Reference authority. Since all references to misuse or misuses of the discovery process were deleted, Sections 2023.010-2023.040 of the Code of Civil Procedure in the Reference authority were also deleted. The Executive Committee of the Board approved these non-substantive changes on September 15, 2015. This matter will be reported to the full Board at the November 12, 2015, General Meeting.)

10. **DISCUSSION AND CONSIDERATION OF WHETHER TO DESIGNATE THE BOARD'S DECISION IN ADRENALINE POWERSPORTS V. POLARIS INDUSTRIES, INC., PROTEST NO. PR-2418-15, AS A PRECEDENT DECISION PURSUANT TO GOVERNMENT CODE SECTION 11425.60, BY THE PUBLIC MEMBERS OF THE BOARD**

The members were provided with a memorandum from Bill Brennan and Robin Parker concerning whether to designate the Board's decision in *Adrenaline Powersports v. Polaris Industries, Inc.* (Protest No. PR-2418-15), as a precedential decision. This matter was taken off the agenda because Adrenaline Powersports filed a Petition for Writ of Administrative Mandamus in Sacramento County Superior Court.

11. **CONSIDERATION OF THE BOARD'S DECISION IN LIGHT OF JUDGMENT GRANTING CAPACITY OF TEXAS' PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS AND THE COURT'S ISSUANCE OF A PEREMPTORY WRIT OF MANDATE**

GUARANTEE FORK LIFT, INC., dba GFL, INC. v. CAPACITY OF TEXAS, INC.
Protest No. PR-2361-13

Consideration of the Board's Decision in light of the Sacramento County Superior Court's Judgment granting Capacity of Texas' Petition for Writ of Administrative Mandamus and the Court's issuance of a Peremptory Writ of Mandate compelling the Board to set aside its Decision and issue a new Decision overruling the Protest and allowing termination of the franchise, by the Public Members of the Board.

This matter was taken off the agenda because the Peremptory Writ of Mandamus and Judgment have not been signed by the Court.

12. **PUBLIC COMMENT. (GOV. CODE § 11125.7)**

No additional public comment was presented.

13. ADJOURNMENT

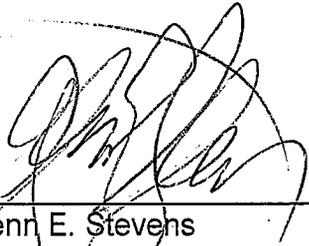
With no further business to discuss, the meeting was adjourned at approximately 1:32 p.m.

Submitted by



WILLIAM G. BRENNAN
Executive Director

APPROVED:



Glenn E. Stevens
President
New Motor Vehicle Board