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NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

In the Matter of)
)
RUFFNER'S TRAILERS, INC.,)
A California corporation,)
)
Appellant,) No. A-36-73
)
DEPARTMENT OF MOTOR VEHICLES,) Filed: August 30, 1973
OF THE STATE OF CALIFORNIA,)
)
Respondent.)
_____)

Time and Place of Hearing: July 11, 1973, 1:30 p.m.
Room 133, Resources Building
1416 Ninth Street
Sacramento, California

For Appellant: Bryce H. Neff
Attorney at Law
18345 Ventura Boulevard, Suite 508
Tarzana, CA 91356

For Respondent: R. R. Rauschert, Legal Adviser
Department of Motor Vehicles
By: Leo Bingham
Staff Counsel

FINAL ORDER

Ruffner's Trailers, Inc., hereinafter referred to as
"appellant", appealed to this board from a disciplinary action
taken against the corporate license by the Department of Motor

Vehicles following proceedings pursuant to Section 1500 et seq. Government Code.

The Director of Motor Vehicles found that appellant had:

1. Caused to be disconnected the odometers of one Ford pickup truck, two Utopia motor homes and five Lifetime motor homes, thereby, violating Section 11713(n) Vehicle Code; and
2. Operated a Ford pickup truck on the highways under appellant's dealer plates, thereby, violating Section 11705 Vehicle Code.

The director further found that the motor homes were new vehicles and that the odometers had been disconnected at the factory; that appellant was of the mistaken opinion that this practice was permissible in order to protect the full warranty of the customer; and that a few days prior to the inspection by department investigators, appellant had been advised that odometers would no longer be disconnected at the factory which produces Lifetime motor homes.

The director ordered appellant's license, certificate and special plates suspended for a period of 30 days with 17 days of the suspension stayed for a period of one year, during which time appellant would be on probation subject to the

condition appellant obey all laws of the United States, the State of California and its political subdivisions, and the rules and regulations of the Department of Motor Vehicles.

In amplification of his order and the terms of probation, the director further specified, with respect to the 13-day suspension to be effectuated, the number of days' suspension allocated to each violation as follows:

5 days' suspension for the odometer disconnect of the Ford pickup; 5 days' suspension for the odometer disconnects of the five motor homes and 3 days' suspension for the misuse of the dealer plates.

The appellant has appealed on the grounds that: (1) The department has proceeded without or in excess of its jurisdiction; and (2) the department has proceeded in a manner contrary to law. Specifically, appellant contends the director's order imposes a sanction against the license of a corporation which was not a party to this case.

We will first address the issue raised by the appeal^{1/} and then consider whether the findings are supported by the evidence.

^{1/} The appeal was considered, without oral argument, on the briefs filed by appellant and respondent.

DOES THE DIRECTOR'S ORDER IMPOSE SANCTIONS AGAINST A CORPORATION
NOT A PARTY TO THE CASE?

The facts pertinent to this issue are as follows:

The department, to establish the record of pleadings in this case, introduced in evidence the accusation, together with other documents not here relevant. The hearing officer thereafter, without objection by appellant, took official notice of paragraphs I and II of the accusation. Paragraph II recites:

"That at all times mentioned herein, Respondent [Appellant] RUFFNER'S TRAILERS, INC., a California corporation, was doing business at 7755 Sepulveda Boulevard, Van Nuys, 9730 Garvey Boulevard, South El Monte, and 8605 Artesia Boulevard, Bellflower, County of Los Angeles, State of California, operating said business under and by virtue of a dealer's license, certificate and special plates (D-8944 & TR-56) duly issued to it by the Department of Motor Vehicles."

The findings in Paragraph II of the Director's Decision contain the identical language recited in the Accusation and as above set forth.

The only evidence introduced by the department was an affidavit of a departmental investigator, Mr. Whetmore, which attests that he and another investigator called at appellant's place of business at 7755 Sepulveda Boulevard, Van Nuys, where he inspected the motor vehicles and found violations which gave rise to the accusation in this case.

Appellant now contends that he was not doing business at

the matters which he now claims are erroneous. Even assuming that the two operating locations were erroneously included in the findings, we would conclude that appellant's contention is without merit. Sanctions imposed by Section 11705 Vehicle Code are against a dealer's license and not against a geographical location. Under the decision, dealer license, certificate and special plates D-8944 and TR-56 are ordered suspended for the stated period irrespective of where Ruffner's Trailers, Inc., is doing business.

We observed that if any cause to complain exists because of the decision, Ruffner's Trailer Sales, Inc., would be the proper party in interest and not the appellant. In the case before us, Ruffner's Trailer Sales, Inc. (dealer license, certificate and special plates D-1276 and TR-1840) was not named in the accusation, did not appear as a party in interest at the hearing and is not included in or affected by the director's decision. For the reasons stated, the issue raised by the appellant is deemed to be without merit.

ARE THE DIRECTOR'S FINDINGS SUPPORTED BY THE EVIDENCE?

Section 3054(d) Vehicle Code requires us to use the independent judgment rule when reviewing the evidence. Pursuant to this rule, we are called upon to weigh the evidence to resolve conflicts in our own minds, draw such inferences as

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we believe to be reasonable and make our own determination regarding the credibility of witnesses and testimony in the transcript of the administrative proceedings. (Holiday Ford v. Department of Motor Vehicles, A-1-69; Weber and Cooper v. Department of Motor Vehicles, A-20-71.)

Applying the weight of the evidence rule, we find sufficient support for the director's findings only with respect to so much of Finding IV as finds that appellant "caused to be disconnected the odometer of the vehicle described as Item 1 in Exhibit A (Ford pickup), which did reduce the mileage indicated on the odometer gauge, and Finding V (misuse of dealer's plates). We do not find sufficient support for Finding IV that the appellant "caused to be disconnected" the odometers of the vehicles described as items 2 through 8 in Exhibit A (5 Lifetime motor homes and 2 Utopia motor homes.)^{2/}

With reference to the Lifetime motor homes, the department's only evidence to support the findings were the statements contained in the affidavit of the departmental investigator, John Whetmore. He attested that there were certain vehicles on appellant's lot on a certain date with

^{2/} While Section 11713(n) and Section 28051 Vehicle Code speak respectively of unlawfulness of a "holder of a license" and "any person" to disconnect an odometer, we need not concern ourselves here with the wording of the finding "caused to be disconnected" as a licensee is responsible for the acts of his employees (Reimel vs. Board of Alcoholic Beverage Control, 252 Cal.App.2nd 520).

disconnected odometers and that Dale, an officer of appellant corporation, stated that he [Dale] was aware the odometers were disconnected and that he "accepts full responsibility." According to Whetmore, Dale said the vehicles were driven from Iowa to California with the odometers disconnected "on his [Dale's] orders."

The statute with which we are herein involved is Section 11713(n) Vehicle Code (see Section 28051 V.C.^{3/}). Section 11713(n) reads in pertinent part as follows:

"It shall be unlawful and a violation of this code for the holder of any license issued under this article: . . .
(n) To disconnect, turn back, or reset the odometer of any motor vehicle in violation of Section . . . 20851."

Having a vehicle with a disconnected odometer in one's inventory and being aware of that fact is not, in and of itself, a basis for license discipline. Neither does a basis for license discipline necessarily arise from appellant's officer accepting responsibility therefor.

In the absence of other facts, a permissible inference of appellant's odometer-tampering culpability could be drawn from the facts in this case. But, here we have an abundance of evidence negating such inference.

Before examining the inference-negating evidence, let us focus on Dale's statements to Whetmore. Dale's acceptance of

^{3/} Sec. 20851 Vehicle Code reads as follows: "It is unlawful for any person to disconnect, turn back or reset the odometer of any motor vehicle with the intent to reduce the number of miles indicated on the odometer gauge."

"full responsibility" does not tell us for what he is accepting responsibility. It may have been for the actual act of disconnecting or possibly for the vehicles being in inventory with disconnected odometers. As previously indicated, the latter does not provide a basis for license discipline.

Dale's statement that the Lifetime vehicles were driven from Iowa to California with the odometers disconnected "on his orders" is also ambiguous. The statement is susceptible of several meanings: that the vehicles were driven to California on Dale's orders without his giving any thought to the odometers; that Dale ordered the vehicles knowing they would be driven to California with the odometers disconnected; or that Dale ordered that the odometers be disconnected and the vehicles driven to California. Only the latter could give rise to license discipline.

The evidence negating any inference of appellant's culpability with reference to the Lifetime vehicles is the following. Appellant had in the past regularly accepted delivery at its premises of vehicles from Lifetime with odometers disconnected (R.T. 6:19-21). Lifetime's western sales manager, Keith Haugen, testified that the odometers had "...been disconnected when they [vehicles] left the factory." This was for warranty preservation purposes. (R.T. 11:18-25.) It was Lifetime's practice to deliver all motor homes to California with

odometers disconnected (R.T. 12:19-23), according to Haugen. The disconnecting was not at the instigation of the dealers; the odometers were never connected at the factory (R.T. 12:27 to R.T. 13:9). A copy of a news letter (presented by Dale to the investigator and attached to his affidavit) from the makers of the Lifetime Motor Homes informing dealers that henceforth the makers would connect odometers at the factory was dated March 24, 1972, six days before the investigation.

Any inference of actual odometer tampering on appellant's part arising from the mere fact that vehicles were found in his inventory is effectively destroyed by the direct evidence that long before the vehicles were delivered to appellant, the odometers were either disconnected or may never have been connected at all.

The above-discussed evidence also assists us in properly interpreting appellant's ambiguous remarks to Whetmore. Because the odometer mechanism would never be hooked up at the factory and was left in that condition during delivery to the retailer to protect the warranty, pursuant to the manufacturer's policy, it does violence to rational thinking to hold that Dale accepted full responsibility for disconnecting the odometers or that he ordered the disconnections. Thus, Dale could only have meant that he accepted full responsibility for vehicles being in inventory with disconnected odometers. Further, he must have

meant either he ordered the vehicles without giving any thought to the odometers or that he ordered the vehicles without giving any thought to the odometers or that he ordered the vehicles knowing they would be driven to California with disconnected odometers. None of these is a basis for license discipline.

With reference to the Utopia Motor Homes, the only evidence produced by the department is that the two vehicles were in appellant's inventory with disconnected odometers when the investigators inspected. According to the investigator, Dale was unable to explain the disconnections. The vehicles were made locally (Westminster, California) and the investigator attested that the mileage registered at the time they were observed by the investigators "approximates" the mileage from the factory to the appellant's place of business. This, if true, would raise a permissible inference that the vehicles were driven from the factory to appellant's place of business with the odometer operating and then disconnected after they arrived. However, the evidence shows that the distance between the factory and appellant's place of business is 53 miles and, according to the department's evidence, one Utopia motor home registered 33 miles and the other registered 30 miles. Thus, all the department has proven regarding the Utopias is that two such motor homes were in appellant's inventory with

disconnected odometers and with a mileage reading less than the distance from the factory to appellant's premises.

One could possibly infer that the vehicles were driven about 30 miles from the factory and then the odometers were disconnected. But, appellant's unrefuted testimony is that the vehicles were delivered to appellant's premises by the manufacturer and were so delivered with disconnected odometers.

(R.T. 6:23 to R.T. 7:2.)

The evidence preponderates to the view that appellant accepted the two Utopia Motor Homes with disconnected odometers and placed them in inventory in that condition. Doing so is not a basis for license discipline.

As we said in *Tradeway Chevrolet Company, Inc. v. Department of Motor Vehicles, A-24-72*, and cases cited therein:

"We have on several occasions in the past expressed our firm position that odometer tampering is a serious matter and the malefactor should be the recipient of severe sanctions ... We are, however, equally firm in our position that sanctions should be imposed only upon the proper party. The department has not established that this appellant was that party. The evidence on the ultimate issue simply was wanting."

This language is equally applicable to the case before us.

Accordingly, and for the reasons stated, so much of the Finding of Fact IV as finds that appellant caused to be disconnected the odometers on those vehicles described as

items 2 through 8 in Exhibit A is reversed. The remaining Findings of Fact are affirmed. The Determination of Issues I, II and so much of III as relates to the Ford pickup truck are affirmed.

Pursuant to Sections 3054(f) and 3055 Vehicle Code, the New Car Dealers Policy and Appeals Board amends the decision of the Director of Motor Vehicles as follows.

WHEREFORE, the following order is hereby made:

The Vehicle Dealer's license, certificate and special plates (D-8944 and TR-56) heretofore issued to appellant, Ruffner's Trailers, Inc., are hereby suspended for a period of twenty-five (25) days, with twenty (20) days of the suspension stayed for a period of one year during which time appellant's license, certificate and special plates shall be placed on probation to the Director of Motor Vehicles upon the following terms and conditions:

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of the Department of Motor Vehicles after providing appellant due notice and an opportunity to be heard may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective September 24, 1973.

AUDREY B. JONES

PASCAL B. DILDAY

GILBERT D. ASHCOM

MELECIO H. JACABAN

W. H. "HAL" McBRIDE

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A-36-73

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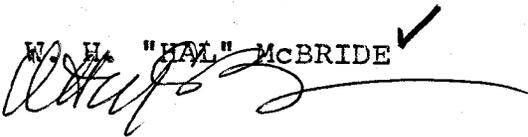
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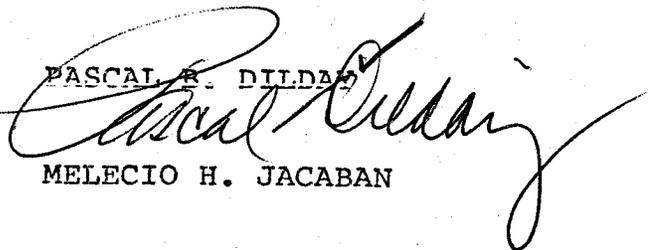
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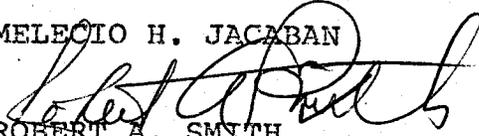
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