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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Petition of

R.L. WALTERS,

Petitioner,

vs.

PACCAR, INC.,

Respondent.

Petition No. P-164-88

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 24th day of October, 1991.

By


MANNING J. POST
Vice-President
New Motor Vehicle Board

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STATE OF CALIFORNIA
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In the Matter of the Petition of)
R.L. WALTERS,)
Petitioner,) Petition No. P-164-88
v.) PROPOSED DECISION
PACCAR, INC.)
Respondent,)

PROCEDURAL BACKGROUND

1. This petition was filed with the New Motor Vehicle Board ("Board") on August 19, 1988 pursuant to the provisions of Vehicle Code Section 3050 (c).^{1/}

2. Petitioner, R. L. Walters ("Walters" or "Petitioner") is a 73 year old resident of Stockton, California, who was, during 1978 and 1979, a Kenworth truck dealer, with dealerships in Stockton and Fresno, California.

^{1/} All statutory references are to the Vehicle Code unless otherwise indicated.

Those dealerships had a net value of more than \$1 million at that time.

3. Respondent, Paccar, Inc. ("Paccar" or "Respondent") is a manufacturer and distributor of large motor trucks including Kenworth and Peterbilt.

4. Paccar is and at all relevant times was a licensed manufacturer and distributor of new motor vehicles in California. Walters was at all relevant times a licensed new motor vehicle dealer in California.

5. Gene Treadway is the President of Kenworth Sales based in Salt Lake City, Utah, a Kenworth dealership of long standing with outlets in Utah and Idaho.

6. The hearing on this petition was originally scheduled to commence on December 5, 1988, but, pursuant to stipulation of counsel, was subsequently continued six times. On October 30, 1989, the hearing was taken off calendar pending the resolution of a motion to dismiss which had been filed by Respondent.

7. Respondent's motion to dismiss was heard on March 1, 1990 before Alfred Song, administrative law judge for the Board. This motion to dismiss was denied by order dated July 27, 1990.

8. The petition was reset for hearing on January 7, 1991 and was subsequently continued to March 18, 1991. A request for a further continuance was denied on March 12, 1991.

9. The hearing was held before Douglas Drake, administrative law judge for the Board, on March 18 and 19, 1991 and May 9, 1991.

10. Petitioner was represented by Kenneth J. Harrington, Esq. of O'Brien and Harrington, 465 California Street, Suite 400, San Francisco, California.

11. Respondent was represented by David Eiseman, Esq. of Bronson, Bronson and McKinnon, 505 Montgomery Street, San Francisco, California.

ISSUES PRESENTED

- a. Was Respondent's refusal to approve Petitioner's transfer of his franchise to Treadway unreasonable and in violation of Vehicle Code sections 11713.3(d) and (e)?
- b. Did Petitioner suffer damage as a result of Respondent's actions?
- c. Is Petitioner barred under the doctrines of waiver, laches or the statute of limitations from bringing this action before the Board?
- d. Did Respondent materially misrepresent the financial condition of the Tardiff group?

FINDINGS OF FACT

General Findings of Fact

12. In 1978, Petitioner decided to sell his business so that he and his wife could retire and live off the proceeds of the sale. Following negotiations with a Mr. Gene Treadway ("Treadway"), who was President of Kenworth Sales Company of Salt Lake City, Utah, ("Kenworth Sales"), Petitioner and Treadway entered into a contract for the sale of the dealerships. According to the contract, a sales price of \$1,287,288.50 was to be paid.

13. On January 1, 1979, Treadway had himself been a Kenworth dealer for 35 years, with outlets in Idaho and Utah.

Treadway had successfully and profitably operated these dealerships, and had considerable experience in the franchised business. He also had the financial capability, not only to successfully maintain his existing dealerships, but also to operate Walters' dealerships in a successful manner.

14. In addition to his experience and financial capability, Treadway was also qualified in terms of positive individual qualities to operate the Walters' dealerships.

a. Findings of Fact Relating to the Reasonableness of Paccar's Actions.

15. Vehicle Code Section 11713.3 provides, in relevant part, as follows:

It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do any of the following:

(d) To prevent or require, or attempt to prevent or require, by contract or otherwise, any dealer, or any officer, partner, or stockholder of any dealership, the sale or transfer of any part of the interest of any of them to any other person or persons. No dealer, officer, partner, or stockholder shall, however, have the right to sell, transfer, or assign the franchise, or any right thereunder, without the consent of the manufacturer or distributor except that the consent shall not be unreasonably withheld.

(e) To prevent, or attempt to prevent, a dealer from receiving fair and reasonable compensation for the value of the franchised business. There shall be no transfer or assignment of the dealer's franchise without the consent of the manufacturer or distributor, which consent shall not be unreasonably withheld.

16. On or about January 5, 1979, Treadway submitted the contract, along with his proposal for continuing the Petitioner's operations, to Paccar for its review and approval, as required by the franchise agreement and by sections 3060 and 11713.3 (d) and (e).

17. Respondent stated on December 5, 1979, that it would consent to the transfer from Petitioner to Treadway "if, in some way, the Treadway family would sell control of Boise Kenworth to Hatch Barrett." Respondent also stated on that date that "there was no resistance here within the company at all to Gene Treadway buying the two dealerships. There was concern on our part that the operation was becoming so large that it would become unmanageable." {Interoffice Communication of K.M. Rowe of December 5, 1979}.

18. The Boise operation was financially sound and managed by a qualified manager.

19. Respondent, through Mr. William Gross, admitted to making a mistake in requiring the sale of the Boise outlet and not approving the transfer earlier. This conclusion is based on the following evidence:

a. Petitioner, at page 61, line 14 to page 62, line 16 of the transcript, stated that he had a conversation with William Gross wherein Gross stated that Respondent had made an error in placing the restriction on the sale of Treadway's selling of the Boise operation and that the restriction was not a valid, good reason for refusing to consent to the sale.

b. In addition, Petitioner wrote Respondent a letter of April 2, 1980, directed to Robert Sergeson, confirming the conversation and these specific statements attributed

to William Gross. Respondent did not within a reasonable time deny Gross' making of the statements attributed to him in the letter.

c. Mr. Gross, at his deposition, page 36, line 15 to page 37, line 4, stated that he could not deny making said statements.

d. Mr. Gross, at the hearing, RT II, page 8, line 24 to page 9, line 4, also testified that he could not deny making said statements.

20. In addition, notwithstanding Respondent's admissions that the restriction was not a valid one, Respondent presented evidence in an attempt to establish that there were three other reasons why Respondent was not unreasonable in withholding consent to transfer.^{2/} These three reasons are the following:

a. The California franchises were to be managed by Gene Treadway's son, Pat Treadway;^{3/}

b. The Treadway operation was suffering financial problems in 1979; and

c. The Treadway operation was suffering managerial problems in 1979.

^{2/} It is significant to note that there was no mention of any these three reasons in any correspondence to or conversation with Petitioner concerning this issue.

^{3/} This issue was raised at the hearing on the motion to dismiss as well as the evidentiary hearing on the merits of this petition, but was not raised in Paccar's Post-Hearing brief, evidently abandoned, but nevertheless considered in arriving at this proposed decision.

21. The evidence established that Respondent did not truthfully harbor these three reasons between the operative dates of January 5, 1979 and April 2, 1980, upon which to base its decision to deny the proposed transfer of the franchise. Instead, the evidence established that Respondent relied upon the content of the December 5, 1979 Interoffice Memo of Respondent as well as Petitioner's letter to Respondent dated April 2, 1980 in reaching this decision.

22. In addition, the evidence established that these three reasons advanced by Respondent, even if they had been considered by Respondent in 1979, would not justify reasonable withholding of consent to the Walters/Treadway transfer, based on the following evidence:

a. Pat Treadway was not to manage the California operations. Micheal C. Whitaker was to manage the Stockton store and Gordon Johnson was to manage the Fresno operations.

b. The Treadway operation was not suffering financial problems in 1979.

c. The Treadway operation was not suffering managerial problems in 1979.

23. With respect to the financial condition of Treadway, of the uncontradicted evidence in the form of audited financial statements establish the following:

	<u>3/31/77</u>	<u>3/31/78</u>	<u>3/31/79</u>
Sales	14,402,091	26,713,169	32,382,815
Gross Profit from Sales	2,059,868	2,608,835	3,730,471
Net Income from Operations	627,382	739,815	939,223
Net Income before Taxes	729,140	929,788	1,122,488
Net Income	387,804	518,982	594,949
Ending Working Capital	2,116,677	2,551,821	2,694,607
Retained Earnings	2,817,156	3,243,870	3,776,984

Thus, the Treadway operation was undergoing a strong growth at the time of the proposed transfer.

24. Treadway was member of a dealer group, which consisted of a total of 20 dealers, independent of Respondent. Treadway was ranked Number One in overall performance for the year 1979.

25. Treadway was one of only two dealers to whom Respondent sold trucks for checks rather than Respondent-controlled draft arrangements with dealer's banks.

26. Additionally, and perhaps most significant, Treadway weathered the recession in the trucking business during the early 1980's. Many other members of the business did not, including Respondent's franchises in Fresno and Stockton.

27. With respect to the alleged managerial problems of Treadway, Gene Treadway was the president and general manager

of the Treadway operations in 1979. The business was originally founded in 1944 by Walter Treadway, Gene's father. Gene had been involved in the business since its inception and had assumed control in January 1972, upon the death of his father.

28. Pat Treadway testified that the business did not experience any managerial problems in 1979.

29. Furthermore, in an independent assessment, Security Pacific Bank, who was to provide the flooring line for the purchase of Respondent's vehicles by the proposed Treadway Stockton and Fresno operations, was impressed with Treadway's Salt Lake City facility and organization.

30. Additionally, as noted above, Treadway was ranked Number One in overall performance for the year 1979 in its 20-member dealer group.

31. And last, Respondent's own Robert Sergeson testified that Treadway's business did not experience any managerial problems.

32. All of the foregoing was confirmed by Respondent's own audited financial statements, set forth elsewhere in this decision.

b. Findings of Fact Relating to Damages.

33. On or about June 4, 1980, subsequent to the time that Respondent refused to consent to the transfer of the business to Treadway, Walters entered into a sales agreement with the Tardiff group.

34. The Walters-Tardiff sales agreement included a sale price of \$1,150,023.51.

35. Walters claims damages of \$662,881.18 because Tardiff subsequently failed or refused to pay the entire sales price. However, Paccar's withholding of consent was not the proximate cause of this loss. Rather Walter's desire to risk collection of the sales price on an installment payment plan, his failure to obtain adequate security for his investment, and the general downturn in the economy were the proximate causes of this loss. There was no evidence to establish that Paccar should be held liable for Tardiff's non-payment.

36. The nature and the extent of this loss by Walters was reasonably foreseeable by Paccar at the time it violated Sections 11713.3 (d) and (e).

37. As a direct and proximate result of the conduct of Respondent in withholding its consent to the Walters-Treadway transfer, in violation of the Vehicle Code as set forth above, Walters suffered a pecuniary loss of \$137,204.99, calculated as follows:

Treadway Contract Amount	\$ 1,287,288.50
Tardiff Contract Amount	less \$ <u>1,150,023.51</u>
	\$ 137,264.99

c. Findings of Fact Relating to Waiver, Laches and Statute of Limitations.

38. Walters waited until January 10, 1984 to file a state court action containing allegations nearly identical to those involved here. In 1988, the state court granted a motion for summary judgment brought by Paccar on the ground that Walters had failed to exhaust his administrative remedies

before the Board. Walters filed the instant petition before the Board on August 19, 1988.

39. Failure of Walters to exhaust his administrative remedies affects the court's subject matter jurisdiction to adjudicate the dispute, but Vehicle Code section 3050(c), the operative provision which vests in the Board jurisdiction to consider such matters, contains no statutory provision which limits the time within which such an action must be commenced. As such, at the time this petition was filed, Walters still had the ability to seek relief before the Board, subject to the defenses of laches or waiver.

40. In the instant petition, Walters was proceeding towards trial in Superior Court when the cases of Yamaha Motor Corporation, U.S.A vs. Superior Court (1986) 185 Cal. App. 3d 1232 and Yamaha Motor Corporation, U.S.A vs. Superior Court (1987) 195 Cal. App. 3d 652 were decided. The result of these cases is to require any aggrieved individual such as Walters to exhaust his administrative remedies before the Board before seeking judicial relief. Paccar's motion for summary judgment was granted on this ground, after which Walters promptly filed his petition before the Board. Paccar was not prejudiced by this change in forum because the parties had already been involved in litigation for several years.

41. Laches has been defined as the unreasonable delay in filing an action combined with either acquiescence in the act of which Petitioner complains or prejudice to the Respondent. Walters did not acquiesce to Paccar's conduct by selling to the Tardiff group, but instead was attempting to

mitigate damages with Paccar's consent. Such conduct does not waive Walter's rights, as such, Paccar was not prejudiced. After careful consideration of the facts and arguments in this case, it is determined that there was not sufficient prejudice to Paccar by the delay in filing the Petition before the Board to invoke the doctrine of laches or waiver under these circumstances.

d. Findings of Fact Relating to Material Misrepresentations.

42. Walters failed to establish that Respondent made material misrepresentations or omitted to disclose material facts concerning the financial condition of the Tardiff group. Paccar, as a matter of policy, does not involve itself in buy/sell negotiations between dealer principals. There was no evidence presented to establish that Paccar violated this policy with respect to the Walters-Tardiff negotiations.

43. Furthermore, Walters failed to establish that there was a fiduciary or confidential relationship between Paccar and Walters in connection with the operation of the parties' respective businesses. The bargaining positions of the parties were not inherently unequal and the motivating factor of the parties' relationship was profit. Furthermore, the business relationship between the parties was not such that Walters had to place an amount of trust in Paccar sufficient to warrant application of potential liability for misrepresentation on the part of Respondent. Accordingly, the

elements necessary to support a cause of action based upon material misrepresentations are not present in this matter.

44. In addition to the foregoing, Walters failed to establish that he actually and justifiably relied on any alleged misrepresentations of material facts or that he acted by reason of the nondisclosure of material facts concerning the financial condition of the Tardiff group.

DETERMINATION OF ISSUES

1. Respondent violated Vehicle Code Section 11713.3 (e) by unreasonably withholding its consent to Walters' proposed transfer of his franchise to Treadway.

2. Respondent violated California Vehicle Code Section 11713.3 (d) by unlawfully preventing Walters from transferring his Kenworth dealerships to Treadway, during the first half of 1979, pursuant to the terms of the sales contract between Walters and Treadway dated January 2, 1979, and by unreasonably withholding its consent to said transfer.

3. Petitioner is entitled to recover from Paccar, as damages, the sum of \$137,264.99, plus prejudgment interest from and after June 4, 1980. As the amount of damages was determined at the time of sale, interest is at 7% per Civil Code Section 3287.

4. Petitioner failed to establish that Respondent misrepresented the financial qualifications of the Tardiff group.

5. Under the particular circumstances of this case, the timing of the filing of Walters' petition was reasonable and did not cause Paccar to suffer prejudice.

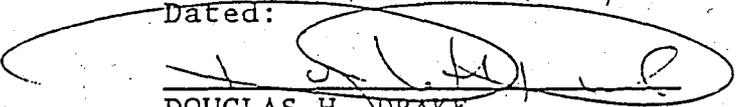
PROPOSED DECISION

THEREFORE, the proposed decision is respectfully submitted:

Petitioner shall recover from Paccar, as damages, the sum of \$137,264.99, plus prejudgment interest from and after June 4, 1980. As the amount of damages was determined at the time of sale, interest is at 7% per Civil Code Section 3287.

I hereby submit the foregoing which constitutes my proposed decision on the above-entitled manner, as a result of a hearing before me on the above dates and recommend adoption of this proposed decision as the decision of the New Motor Vehicle Board.

Dated: 2.15.81


DOUGLAS H. DRAKE
Administrative Law Judge
New Motor Vehicle Board