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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
)
KEN COLLINS, doing business as)
KEN COLLINS BUICK,)
)
Franchisee,) Protest No. PR-2-74
)
vs.) N-5181
)
AMERICAN MOTORS SALES CORPORATION,) FILED: March 19, 1975
)
Franchisor.)

DECISION

On April 24, 1974, AMERICAN MOTORS SALES CORPORATION (American Motors) notified KEN COLLINS, doing business as KEN COLLINS BUICK (Collins Buick) that the latter's franchise to sell American Motors' Jeeps in the South Lake Tahoe area was terminated effective July 29, 1974.

Collins Buick thereafter filed a notice of protest pursuant to the provisions of Vehicle Code, Section 3060 1/, and, in accordance with Section 3066, this Board designated a hearing officer to hear the evidence relating to the protest. Such a hearing was held on September 24 and October 4, 1974. The hearing officer submitted his proposed decision to this Board on December 5, 1974, recommending that Collins Buick's protest be overruled. On December 20, 1974, this Board considered the recommendation but, after a review of the entire record, chose not to adopt the decision proposed by the hearing officer. The matter was therefore heard by the Board on February 19, 1975. 2/

1/ All references, unless otherwise noted, are to the Vehicle Code.

2/ Board Member John Onesian did not participate in the rendition of this decision.

The Board has adopted a number of the Findings of Fact contained in the proposed decision of the hearing officer. The Findings of Fact adopted without modification by the Board are set forth in full below:

"I

Beginning in 1951, and at all times material herein, the protestant Franchisee [Collins Buick], a sole ownership, was franchised as a Jeep dealer for and in El Dorado County, California. In 1966, separate franchises were issued for the Franchisee's Placerville location and the so-called 'South Lake Tahoe' region which is the sole relevant market area in the present proceedings, the Jeep franchise held by the Franchisee for his Placerville location not being in issue here. Geographically, the relevant market area consists of the southern half of Lake Tahoe and the surrounding area, roughly rhomboid in shape and bounded to the west by a line running from a point in California near the town of Kyburz, and south of Highway 50, northerly to the latitude of Homewood, then easterly to and across the Lake to a point just east and slightly north of Zephyr Cove on the Nevada side, then southerly to a point north of Picketts Junction and Luther Pass, and from there westerly to the point of beginning. Thus, the relevant market area includes portions of the States of California and Nevada. The site of the franchise itself is the community of South Lake Tahoe, California.

"II

The franchise was last renewed effective February 11, 1974, for one year to terminate on February 10, 1975, pursuant to a 'Dealer Franchise Agreement' executed by the parties.

"III

By letter dated April 24, 1974, the Franchisor notified the Franchisee that the franchise described in Finding II was terminated effective July 29, 1974.

"IV

On July 26, 1974, the Franchisee filed with the New Motor Vehicle Board of the State of California a 'Notice of Protest and Request for Hearing' pursuant to Article 4 [Section 3060 et seq.].

"V

At all times material herein, the Franchisee, with the knowledge and consent of the Franchisor, also held, and he now holds, Buick, Pontiac, GMC Truck and Opel franchises, as well as the Placerville Jeep franchise mentioned in Finding I. In addition to Jeeps, he sells other makes at his South Lake Tahoe location.

"VI

The Franchisor acquired Jeep, previously owned by other corporations, in February of 1970 and took over the operation in the middle of that year.

"VII

The sole basis for the termination of the franchise relied upon by the Franchisor and contained in the notification described in Finding III is the failure of the Franchisee to transact sufficient business compared to the business available to him, thereby failing to comply with the terms of the franchise agreement.

"VIII

No evidence was presented, and therefore no findings are made, regarding the investment made by the franchisee, the effect of the termination of the franchise on the public, or the manner in which the Franchisee fulfilled the warranty obligations of the Franchisor. It was not established by a preponderance of the evidence that the sales and service facilities, equipment, vehicle parts and qualified service personnel were inadequate to provide reasonably for the needs of the consumers.

* * *

"X

The Franchisee fell far short of achieving the Sales Planning Potential established for the South Lake Tahoe franchise. In the relevant years, his sales were as follows:

Year	Sales Planning Potential	Sales
1972	98	29
1973	98	44
1974	98	28 (based on a projection)

"XI

In percentages, the Jeep sales completed by the Franchisee and set out in Finding X fell far below the corresponding figures for the Zone or Region, the District, and the nationwide total. The approximate figures are as follows:

Percent of Sales Planning Potential
per Model Year

	<u>1972</u>	<u>1973</u>	<u>1974</u>
National	90	135	145
District #5	75	105	90
Zone	70	90	90
Franchisee	30	45	30

"XII

On numerous occasions, representatives of the Franchisor discussed with the Franchisee his failure to achieve, or come closer to fulfilling, the Sales Planning Potential established for the South Lake Tahoe franchise. Many suggestions and counter-suggestions were made. These included improvement of the appearance of the building housing the dealership, employment of different accounting methods, implementation of a specific commission plan for the salesmen, employment of a Jeep-oriented sales manager, stronger advertising, a new sign, and several others. Some of these suggestions were rejected, or simply not heeded by the Franchisee, some were redundant because he was already following the plan or method suggested, and some were accepted by him in whole or in part. The Franchisee contends, and the evidence supports a finding, that he substantially complied with the suggestions, and that his failure to comply with all of them did not materially contribute to his failure to achieve a higher share of the Sales Planning Potential.

"XIII

The Franchisee contends that his failure to make more sales at South Lake Tahoe was caused by the Franchisor's failure to provide him with the units he wanted and needed. He also contends that his sales in the second half of 1973 and the early part of 1974 were severely affected by the energy crisis. It was established by a preponderance of the evidence, and it is found, that on numerous occasions the Franchisee failed to order vehicles

offered to him and that, during the time period here involved, other dealerships in the immediate vicinity, including the Franchisee's Placerville location, reached far higher percentages of their Sales Planning Potential.

"XIV

The Dealer Franchise Agreement mentioned in Finding II provides, to the extent material here, in Section 11 that the dealer shall install and maintain adequate sales and service facilities and personnel, and in Section 13 that the dealer shall be responsible for developing sufficient sales volume to reach the sales planning potential established for him.

"XV

While there was evidence, as described in Findings VIII and XII of failure on the Franchisee's part to meet each and every requirement voiced by the Franchisor, it was not established by a preponderance of the evidence that the Franchisee's conduct in relation to Section 11 of the Dealer Franchise Agreement was such as to constitute good cause for the termination of the agreement.

"XVI

It was established by a preponderance of the evidence that the Franchisee failed, in a substantial manner, to develop sufficient sales volume to reach the sales planning potential established for the franchise here in question."

On December 23, 1974, the Board addressed a letter to the parties in which it indicated that it desired additional argument and, if deemed appropriate, additional evidence concerning the following two questions:

- "(1) the validity and weight to be accorded the 'Sales Planning Potential' in determining the extent the franchisee's failure to comply with the terms of the franchise; and
- (2) the effect on the public welfare if the franchise involved is terminated."

The record of the hearing before the Board reflects that both American Motors and Collins Buick availed themselves of the opportunity to present additional written and oral argument, as well as the testimony of Mr. Jacques O. Polan, the zone manager of American Motors responsible for the market area wherein Collins Buick is located, and the testimony of Mr. Ken Collins, owner of Collins Buick.

A concise explanation of the manner in which the sales planning potential is determined is contained in American Motors' "Written Argument" filed on February 18, 1975, and is set forth in full below:

"The determination begins with a projection of the annual nation-wide four-wheel drive industry volume and the proportion of the industry that will be comprised of Jeep vehicles. [Transcript references omitted.] The latter figure is based upon an estimate of both the production and sales capabilities of American Motors and its dealers, in order to assure both that the base number used for sales planning does not exceed production capacity, and conversely, that production does not exceed the ability of American Motors' dealers to sell the vehicles. The national base of Jeep sales is then divided among regions (zones) based upon the actual number of new four-wheel drive vehicles registered in the region in 1969 and 1970 and the actual number of Jeep units in operation as of July 1969. The regional Sales Planning Potential, calculated in this fashion, is further refined to the county level based upon each county's actual four-wheel drive registrations in 1969 and 1970. The county's Sales Planning Potential is divided among the towns in the county on the basis of the actual number of four-wheel drive units in operation. The individual dealer's Sales Planning Potential is the sum of the numbers for the towns that are within his market area."

It is apparent that the sales planning potential for each franchisee is ultimately based on a projection of the annual nation-wide four-wheel drive industry volume and of an estimate of that proportion of the industry's production that will be comprised of Jeep vehicles. The latter estimate is, in turn, based on the estimate of the production and sales capabilities of American Motors.

The Board is not persuaded that, even as an abstract matter, a compilation of projections and estimates, which are themselves based on the quicksand of fancy and guesswork, provides a sound and rational basis for projecting the sales (economic) potential of an automobile dealer. In the Board's opinion, American Motors has failed to provide either evidence or an adequate explanation which would establish that there is an underlying economic reality, in terms of performance that can fairly be expected of a franchisee, to the concept of the sales planning potential. Accordingly, only so much as is quoted herein is approved of Finding of Fact IX proposed by the hearing officer:

"During these model years, the Franchisee agreed to, and on August 10, 1972, and January 15, 1974, accepted in writing, 'Sales Planning Potential' determinations made by the Franchisor by means of standard methods in common use throughout the American automobile industry, establishing a sales planning potential for the South Lake Tahoe franchise at 98 motor vehicles per year."

American Motors contends that the sales planning potential constitutes a contractual provision binding the franchisees to sell vehicles in an amount established by the sales planning potential. The relevant contractual provision contained in the Dealer Franchise Agreement is as follows:

"13. Sales Performance. American shall establish a sales planning potential for Dealer's market area and advise Dealer of same. Dealer shall be responsible for developing sufficient sales volume to reach such sales planning potential. Dealer's sales performance shall be evaluated on the basis of comparison of Dealer's actual sales of new Motor Vehicles to such sales planning potential."

While it is true, as found in Findings of Fact X, XI and XVI, that Collins Buick's sales did not meet its sales planning potential, the record reflects that only two out of nine American Motors franchisees in the District where Collins Buick is located met and exceeded the sales planning potential established for them in 1972, 1973 and 1974. Five franchisees, Collins Buick included, never met the sales planning potential during the same period of time. In addition, the Board has found that Collins Buick's failure to comply with a number of American Motors'

suggestions "did not materially contribute" to its failure to "achieve a higher share of the Sales Planning Potential" (Finding of Fact XII). Accordingly, one is left with a standard of performance which the franchisor itself honors more in the breach than in the observance 3/ and which is, in one word, unattainable.

In the Board's view, it is more in keeping with the prior conduct of the parties 4/ to interpret Paragraph 13 of the Dealer Franchise Agreement as a provision requiring Collins Buick to use its best efforts to perform to the satisfaction of American Motors. The prevailing law (see Kadner v. Shields (1971) 20 Cal.App.3d 251, 258, 264) requires that American Motors' "satisfaction" be measured on an objective basis. The Board therefore finds as follows:

FINDING OF FACT XVII

Paragraph 13 of the dealer franchise agreement requires the Franchisee to use its best efforts to perform, on an objective basis, to the satisfaction of the Franchisor.

The evidence is not sufficient to warrant the conclusion that Collins Buick did not perform, on an objective basis, to American Motors' satisfaction. While it is true that Collins Buick's sales were the lowest of any dealer in the District, it is also true that Collins Buick complied with most of American Motors' suggestions and that its failure to adopt all of the Franchisor's suggestions did not "materially contribute" to its failure to meet its sales planning potential. One is therefore left with the conclusion that the Franchisee presumably did what anybody, including the Franchisor, would have done under the circumstances. Thus, while the Board is not prepared to find that Collins Buick's performance was objectively satisfactory, the Board does find that American Motors has failed to meet its burden of proof (section 3066(a)) in showing that the performance disclosed by the record was objectively unsatisfactory.

3/ As noted in Finding of Fact X, Collins Buick itself was far below the supposedly immutable standard for two prior years.

4/ The text of Paragraph 13 itself speaks only of 'evaluating' performance by a "comparison" of actual sales to the sales planning potential.

FINDING OF FACT XVIII

The Franchisor has failed to meet the burden of proving that the Franchisee's performance was objectively unsatisfactory.

In addition to the foregoing, no evidence was presented (Finding of Fact VIII) regarding the investment by the franchisee, the effect of the termination of the franchise on the public or the manner in which the franchisee fulfilled its warranty obligations to the public. In the absence of such proof, the Board is not at liberty to conclude that Collins Buick performed unsatisfactorily in these respects. However, section 3061 mandates that this Board take into consideration these factors, as well, in addition to the extent to which the franchisee failed to comply with the terms of the franchise. In this connection, the Board notes that even though there are other dealers servicing four-wheel drive vehicles in the South Lake Tahoe area, there is no other franchised dealer in that area who will service American Motors' vehicles heretofore serviced by Collins Buick. Although the Board specifically invited the parties' attention to its concern over the effect of the termination of the franchise on the public welfare by its letter of December 23, 1974, American Motors limited itself to proving that the public interest would be benefited by the cancellation of the franchise of a "nonperforming" dealer 5/. Such a definition of the public welfare is too narrow. Accordingly, the Board finds as follows:

5/ Counsel for American Motors made the following statement at the hearing on February 19, 1975, concerning the second issue raised by the Board's letter of December 23, 1974:

"CHAIRMAN KALLAY: I think we are ready to proceed to the second point [of the December 23, 1974 letter], Mr. Kreps.

"MR. KREPS: On the second issue, on the public effect of the termination of the franchise, we did not present any evidence of that beyond what is apparent in the record of the desirability of terminating a dealer that isn't meeting a sales quota, because that issue was not raised by the franchisee, nor was there ever any assertion that it was contrary to the public interest to terminate a nonperforming dealer. However, we do have Mr. Polan here and we would like to put him on briefly, by Mr. Malkin, to explain why it is in the public interest to terminate this dealer in view of this record."

Mr. Polan's testimony did not exceed the limits indicated by Mr. Krep's introductory statement.

FINDING OF FACT XIX

The franchisor has failed to meet the burden of proving that the public would not be injuriously affected by a termination of Collins Buick's franchise.

In view of the foregoing, only the following proposed Determination of Issues is approved:

"I

Article 4 does not conflict with, nor does it violate, Clauses 3 or 8 of Section 8, or Clause 1 of Section 10 of Article I, or Section 2 of Article VI of the Constitution of the United States, or any of them, nor does it deprive the Franchisor of due process of law."

Paragraph II of the proposed Determination of Issues is specifically disapproved and Paragraph III, renumbered as Paragraph II, is modified to state as follows:

II

Good cause for the termination of the franchise was not established under the provisions of Sections 11 and 13 of the Dealer Franchise Agreement.

The Board, therefore, enters the following ORDER:

1. American Motor's motion to dismiss the present proceedings on constitutional grounds is denied.
2. Good cause has not been established for the termination of Collins Buick's franchise.



THOMAS KALLAY, Member

The foregoing constitutes the decision of the NEW MOTOR VEHICLE BOARD.

Dated: March 19, 1975



ROBERT A. SMITH, President