

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

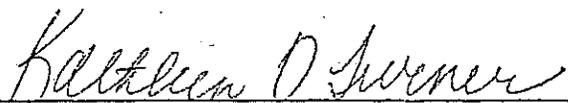
In the Matter of the Protest of)
)
FRIENDLY MOTORS, INC.,) Protest No. PR-278-80'
a California Corporation,)
)
) Protestant,)
)
) vs.)
)
JOHN DREW MOTORS, INC., dba)
SUBARU OF NORTHERN CALIFORNIA,)
a Delaware Corporation,)
)
) Respondent.)
_____)

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 28th day of January, 1981.



KATHLEEN O. TURNER
President
New Motor Vehicle Board

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NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)	
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FRIENDLY MOTORS, INC.,)	Protest No. PR-278-80
A California Corporation,)	
)	
Protestant,)	
)	
vs.)	
)	
JOHN DREW MOTORS, INC., dba)	PROPOSED DECISION
SUBARU OF NORTHERN CALIFORNIA,)	
A Delaware Corporation,)	
)	
Respondent.)	
)	

Procedural Background

1. Pursuant to Section 3060 of the Vehicle Code ^{1/}, Respondent, John Drew Motors, Inc., dba Subaru of Northern California (Subaru), gave notice by letter dated June 20, 1980, of its intention to terminate the franchise of Protestant, Friendly Motors, Inc. (Friendly), located at 3333 Stevens Creek Blvd., Santa Clara, California, 95050.

2. Friendly filed a protest with the New Motor Vehicle Board (Board) on September 11, 1980.

1. All references are to the California Vehicle Code unless otherwise indicated.

3. A prehearing conference was held before Aaron Resnik, Administrative Law Judge of the Board on October 23, 1980, and a hearing was held on November 3, 1980.

4. Subaru was represented by Robert M. Wheatley of the law firm of Memering & Demers. Friendly was represented by John T. Ball of the law firm of Adams, Ball, Wenyel & Kilian.

Jurisdictional Issue Presented

5. Subaru contends that the protest filed by Friendly was not timely and therefore the Board does not have jurisdiction to hear the protest.^{2/}

6. Friendly contends that Subaru caused Friendly to believe that Subaru had withdrawn the notice of termination.

Findings of Fact

Facts Pertaining to Whether the Protest was Timely Filed

7. Section 3060(b) provides in part:

...no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) the franchisee and the Board have received written notice from the franchisor as follows:

1. Sixty days before the effective date thereof...

8. Notice of Subaru's intended action was received by Friendly on June 24, 1980 and by the Board on June 23, 1980.

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2. By agreement of the parties, the only issue at the hearing was whether or not the protest was timely filed. It was also agreed that all other substantive issues were reserved by the parties pending the Board's determination of the jurisdictional issue.

9. Section 3060 further provides in part:

(b) ...the franchisee may file a protest with the Board within 30 days after receiving a 60-day notice...

10. Section 3060 permits a franchisor to terminate if "the appropriate period for filing a protest has elapsed."^{3/}

11. The last date upon which a protest could have been timely filed was July 24, 1980, 30 days after Subaru's notice was received by Friendly.

12. Friendly's protest was filed with the Board on September 11, 1980.

Facts Pertaining to Whether Subaru
Caused Friendly to Believe that Subaru
Had Withdrawn the Notice of Termination

13. The only meeting between Friendly and Subaru from June 23, 1980 to July 24, 1980, was held on July 23, 1980, at the request of an employee of Friendly, Mr. J. D. Barkley. The substance of the meeting related primarily to various changes levelled against Subaru by Friendly.

14. The meeting of July 23, 1980, held at Subaru's office in Sacramento, was regarded by Friendly's president and sole stockholder, Mr. D. W. Graham, (Graham), as a cordial and constructive one, but there was no discussion regarding the withdrawal of the termination notice.

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3. The Board's regulations provide in part:

(a) Protests involving termination or refusal to continue a franchise shall be filed...no later than the 30th day. Title 13 of the California Administrative Code Section 585.

15. On July 24, 1980, Graham and an official of Subaru spoke by telephone. Their understandings of the meeting of the prior day were restated and Graham was told that Subaru had sold its business to Subaru of America.

16. In the conversation of July 24, 1980, Subaru further reiterated that notwithstanding the sale, the termination letter was still in effect. This was understood by Graham.

17. During the period from June 23 to July 24, 1980, Subaru supplied vehicles to Friendly and otherwise regarded Friendly as a franchisee.

18. In an exchange of correspondence between Friendly and Subaru during early August, 1980, it was apparent to Friendly that Subaru was intent on going forward with the termination unless Friendly could resolve its flooring problem forthwith.

19. The exchange of correspondence between Friendly and Subaru ended with a letter from Subaru dated August 26, 1980, which stated in part:

Further to our letter of termination dated June 20, 1980, please be advised that such termination is now being effected in accordance with paragraph 18 of your Subaru Dealership Agreement.

...

I regret that this action has become necessary, however, ample time has been granted to resolve your problems, but without success. We must move ahead in this most important market.

20. Upon receipt of Subaru's August 26, 1980 letter, Friendly filed its protest with the Board.

21. Graham has long been aware of the existence of this Board and the protest rights available to a franchisee.

22. In 1978, a similar termination dispute was resolved by Friendly's securing adequate flooring.

23. In the present case, Friendly elected not to file a timely protest, believing that it could resolve its flooring problem.^{4/}

24. From June 23, 1980, to the date of the hearing, Subaru and its officials did assist Friendly in seeking to resolve Friendly's flooring problems.

25. If appropriate flooring had been secured by Friendly, even after the termination notice, Subaru would have considered withdrawing the notice.

Determination of Issues

1. The protest filed by Friendly was not timely.
2. Subaru did not withdraw its notice of termination, nor did Subaru cause Friendly to believe such withdrawal had occurred.

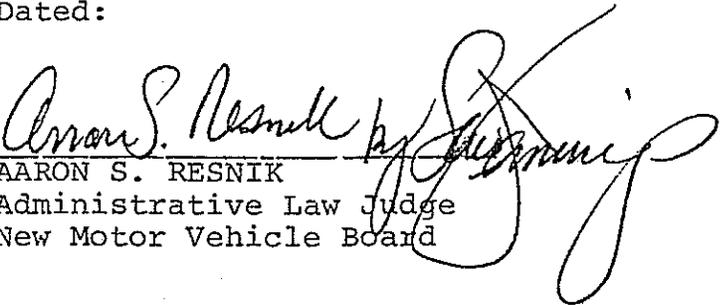
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The following proposed decision is respectfully submitted:

The Protest was not timely filed. The Board is without jurisdiction to hear the Protest. The Protest is therefore dismissed.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing had before me on the above date at San Francisco, California, and recommend its adoption as the decision of the New Motor Vehicle Board.

Dated:


AARON S. RESNIK
Administrative Law Judge
New Motor Vehicle Board

4. As of the date of the hearing, Friendly had still not resolved its flooring problems, and was on "credit hold" with its banking connections. Friendly knew such a credit arrangement was unacceptable to Subaru.