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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

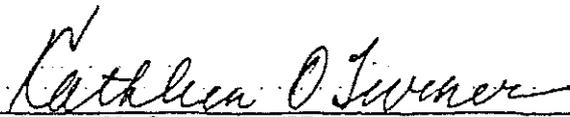
In the Matter of the Protest of)
PIEROTTI MOTORS, INC., dba) Protest Nos. PR-340-81
PIEROTTI FREMONT IMPORTS,) PR-350-81
Protestant,)
vs.)
NISSAN MOTOR CORPORATION)
IN U.S.A.,)
Respondent.)

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 11th day of December, 1981.


KATHLEEN O. TURNER
President
New Motor Vehicle Board

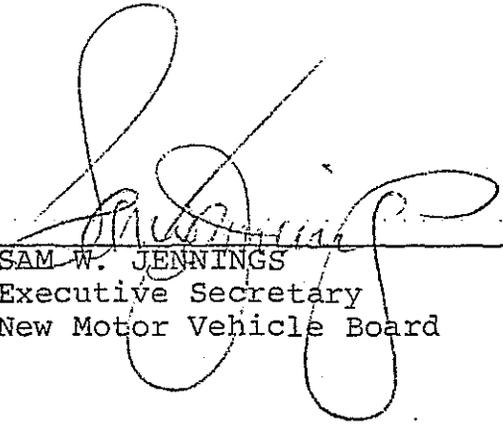
I, SAM W. JENNINGS, Executive Secretary of the New Motor Vehicle Board, do hereby certify as follows:

Attached is a true and correct copy of the Board's decision in the matter of the protest of Pierotti Motors, Inc., dba Pierotti Fremont Imports, vs. Nissan Motor Corporation in U.S.A., Protest Nos. PR-340-81 and PR-350-81.

This Decision was adopted by the New Motor Vehicle Board on November 30, 1981, to become effective immediately.

The above certification is made under penalty of perjury.

Executed this 31th day of December, 1981, in Burlingame, California.



SAM W. JENNINGS
Executive Secretary
New Motor Vehicle Board

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PIEROTTI MOTORS INC., dba PIEROTTI)	Protest Nos. PR-340-81
FREMONT IMPORTS,)	PR-350-81
)	
Protestant,)	
)	
vs.)	<u>PROPOSED DECISION</u>
)	
NISSAN MOTOR CORPORATION IN)	
U.S.A.,)	
)	
Respondent.)	
.....)	

Procedural Background

1. By letter dated August 11, 1981, respondent Nissan Motor Corporation in U.S.A. (Nissan) gave notice to the protestant, Pierotti Motors, Inc., dba Pierotti Fremont Imports (Pierotti), of Nissan's intent to relocate Hayward Datsun, Inc. (Hayward Datsun).

2. The August 11, 1981 letter indicated that Nissan authorized the relocation of Hayward Datsun from 21854 Mission Boulevard, Hayward, California, to 25497 Mission Boulevard, Hayward, California.

3. On August 21, 1981, Pierotti filed a protest with the New Motor Vehicle Board (Board) pursuant to Vehicle Code Section 3062^{1/} (Protest No. PR-340-81).

4. On October 13, 1981, Nissan amended its notice to Pierotti to include an alternate location at 25601 Mission Boulevard, Hayward, California. This alternative location is immediately adjacent to the previously noticed location.

5. On October 27, 1981, Pierotti filed a protest with the Board in response to the October 13, 1981 notice from Nissan (Protest No. PR-350-81).

6. A hearing was held before Anthony M. Skrocki, Administrative Law Judge for the Board, commencing on October 27, 1981, and concluding on November 2, 1981.

7. The protestant was represented by Michael J. Flanagan of the law firm of Pilot and Spar. The respondent was represented by Robert E. Cooper and Elizabeth Grimes of the law firm of Gibson, Dunn and Crutcher.

Jurisdictional Issue

8. On the day the hearing on PR-340-81 commenced, Pierotti filed a second protest (PR-350-81), as a result of the October 13, 1981 notice from Nissan of the alternative site for relocation. Over the objection of counsel for

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

Pierotti, the two protests were formally consolidated for hearing during the course of the hearing on PR-340-81.^{2/}

Informational Background - Motion to Dismiss

9. Art Bridges Enterprises (Bridges) holds the master lease on the property on which Hayward Datsun is presently located and sub-leases the property to Hayward Datsun. Bridges owns other dealerships and properties, including the Pontiac dealership adjacent to Hayward Datsun and the Toyota dealership in Fremont.

10. Prior to July 1, 1981, Ernie Ivaldi (Ivaldi) was the majority owner of Hayward Datsun.

11. In early 1981 Ivaldi considered relocating Hayward Datsun a block south to the former Doty Cadillac location. Doty Cadillac had earlier moved to a different location sold to it by Bridges, and Bridges had acquired the former Doty Cadillac property on which the main dealership building was located.

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2. Pierotti's counsel objected to the consolidation, despite Henry Pierotti's testimony in a deposition taken prior to the hearing that there would be no difference in impact upon his dealership regardless of which of the two proposed locations was selected. Henry Pierotti's concern with the relocation is the location itself and not the proposed facilities. Due to the proximity of the two locations proposed, and the testimony of Henry Pierotti, the attempt to obtain a separate hearing as a result of the notice of the alternative location appears to be a dilatory tactic, which should be looked upon by the Board with disfavor.

12. Bridges desired to purchase Hayward Datsun and, after negotiations, Bridges and Ivaldi with assistance of their attorneys had drawn up and signed an agreement by the terms of which Bridges was to acquire Ivaldi's interest in Hayward Datsun. The agreement provided that Ivaldi and Bridges were to become partners in the former Doty Cadillac building and lease it to Hayward Datsun.

13. In mid-June, prior to signing the lease for the former Doty Cadillac building in behalf of Hayward Datsun, Ivaldi informed Daniel Teves (Teves), who held twenty-five percent of the stock in Hayward Datsun, of the agreement. Teves had a 30-day option to purchase Ivaldi's shares in Hayward Datsun in the event Ivaldi chose to sell.

14. At the end of the 30-day period, Bridges was notified that Teves had exercised his option and that Ivaldi was no longer president and controlling shareholder of Hayward Datsun. This prevented the sale of Hayward Datsun to Bridges from occurring.

15. The shares of Hayward Datsun are presently owned by Teves (51%) and Lionel Sullivan (Sullivan) (49%). Teves acquired the majority interest on July 1, 1981. For a year and one-half prior to that, Teves owned 25% of the stock. Sullivan acquired his interest on August 1, 1981. Both are experienced car dealers in the Hayward area.

16. In mid-June, Bridges had offered Ivaldi a six-month extension (through December 31, 1981) of the sub-lease of the

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Hayward Datsun premises. There is a dispute between the parties as to whether the six-month extension was ever accepted.

17. Shortly after Ivaldi sold his interest in Hayward Datsun to Teves, Bridges initiated an unlawful detainer action to evict Hayward Datsun from the premises. The unlawful detainer complaint has since been amended twice and a cross-complaint has been filed. The suits now include actions for unlawful detainer, intentional misrepresentation, fraud and unfair competition.

18. On the day before the start of the protest hearing, Bridges, at the request of counsel for Pierotti, hand-delivered a document to Teves entitled "Agreement for Lease". If agreed to, it purported to renew the lease for an additional seven-year term, but also purported to have no effect on the civil litigation pending between the parties.

19. Based upon the offered "agreement", which was not assented to by Hayward Datsun, counsel for Pierotti moved to dismiss the protests. The motion to dismiss was based on the grounds of mootness, in that there was no longer any necessity to relocate Hayward Datsun in light of the tendered lease.

20. Apart from the problem of the lease, Nissan was in favor of the relocation of Hayward Datsun because of the inadequacy and location of the present Hayward Datsun facility. Both Hayward Datsun and Nissan, in opposition to the motion to dismiss, expressed their intentions to relocate regardless of the tendered lease agreement.

21. The motion to dismiss the protests was denied.

Issues Presented

22. Pierotti contends there is good cause for not allowing the relocation of Hayward Datsun in that:

- a) The relocation would jeopardize the permanent investment of Pierotti; [§ 3063(1)]
- b) The relocation would have an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area; [§ 3063(2)]
- c) The relocation would be injurious to the public welfare; [§ 3063(3)]
- d) The franchisees of Nissan in the relevant market area are providing adequate competition and convenient consumer care for owners of Nissan products including adequate motor vehicle sales and service facilities, equipment, supply of vehicle parts and qualified service personnel; [§ 3063(4)]
- e) The relocation would have an adverse effect upon competition and therefore would not be in the public interest. [§ 3063(5)]

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Findings of Fact

Facts Relating to Permanency of the Investment
[§ 3063(1)]

Pierotti

23. Henry Pierotti has had an automobile dealership at the present Pierotti location since 1962. The dealership originally marketed the Volvo and Studebaker line makes. The Volvo franchise has been maintained continuously up to the present time.

24. In 1965, Studebaker vehicles were no longer manufactured. In June 1966, Henry Pierotti obtained the Nissan franchise. In the following year, Pierotti was incorporated.

25. Henry Pierotti owns ninety-six (96) percent of the stock of Pierotti. The remaining four percent is owned by Pierotti employees pursuant to an Employee Stock Ownership Trust Agreement.

26. The Pierotti dual-line dealership is located on four acres of land and has 23,000 square feet of buildings.

27. The property on which Pierotti is located is owned by Henry Pierotti and is leased to the corporation under a lease which expires March 31, 1982. The rental is \$8,500 per month. Pierotti has an option to renew the lease for an additional seven-year term at a rent to be agreed upon.

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28. The following indicates the acquisition dates and costs of the properties which presently comprise the Pierotti dealership:

<u>Property</u>	<u>Date Acquired</u>	<u>Cost</u>
Datsun Sales & Service & Volvo Sales Facility	3/14/68	\$ 205,068
Used Car Lot	3/1/69	47,850
Volvo Service Facility (also used for Datsun)	3/17/71	110,738
New Vehicle Storage Area	3/17/71	35,000
Employee Parking Lot	1973-1974	<u>21,000</u>
	TOTAL	\$ 419,656

29. Improvements have been made to the property at a cost of approximately \$230,000.

30. Approximately one-third of the facility space is designated as being for operation of the Volvo franchise, but the premises so designated are not strictly used for Volvo. Some Nissan service work is done in the Volvo service shop but Volvo service work is not done in the Nissan service shop.

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31. The following figures indicate the total new vehicle sales and net profit of the Pierotti dealership for the years indicated:

	<u>Datsun Sales</u>	<u>Volvo Sales</u>	<u>Total New Sales</u>	<u>Dealership Net Profit</u>
1979	897	306	1203	\$259,194
1980	909	227	1136	264,670

32. Pierotti did not experience a shortage of new Nissan vehicles to sell in 1980.

33. In 1980, Henry Pierotti received \$78,000 in salary and a \$20,000 bonus. Mrs. Pierotti, also employed at the dealership, received \$24,000 in salary and a \$5,000 bonus.

Facts Pertaining to Whether the Relocation Will Have an Adverse Effect on the Retail Motor Vehicle Business and the Consuming Public in the Relevant Market Area
[§ 3063(2)]

34. Hayward Datsun is presently located in a declining area of the Hayward central business district. Nissan and Hayward Datsun consider the facilities to be old and inadequate. There is no on-site parking, and street parking is metered and limited.

35. The Hayward Datsun service entrance and driveway are narrow and can accommodate only one car at a time. The service driveway is shared with the Pontiac dealer next door. During peak volume hours, service customers block part of the street which is also narrow and congested.

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36. Hayward Datsun has experienced difficulty with the wiring, plumbing, and roof in its present facility.

37. The City of Hayward General Policies Plan provides for a Special Use Center to include automobile sales and service facilities concentrated in the area to which Hayward Datsun proposes to relocate. This area was chosen due to its wider streets, better vehicular circulation, and larger lots which would minimize blockage of streets by customers' cars. The area chosen does not abut residential property.

38. Other than the area designated as the Special Use Center, no other area in the City of Hayward would be within the City's requirements for establishing an auto sales and service facility without a waiver or variance from the City.

39. Hayward Datsun is presently located on the northern end of an auto row in Hayward. Hayward Datsun proposes to relocate to an area in Hayward 1.9 miles south of its present location, but within the same auto row.

40. The Hayward auto row includes dealers in the following line makes: Porsche-Audi, AMC, Volvo, Toyota, British-Leyland, Pontiac, Volkswagen, Mazda, Buick, Cadillac, Honda, Ford, Chrysler-Plymouth, and Dodge.

41. Pierotti is located on the northern end of an auto row in Fremont, in a different marketing area.

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42. To the south of Pierotti in San Jose are the number one (San Jose Datsun) and number three (Downtown Datsun) Nissan sales leaders in the country. The sales made by these dealers into the Pierotti primary market area (PMA)^{3/} are as follows:

	<u>1980</u>		<u>1981</u>	
	<u># Datsun Sales Registered in Pierotti PMA</u>	<u>% Total Datsun Sales Registered in Pierotti PMA</u>	<u># Datsun Sales Registered in Pierotti PMA</u>	<u>% Total Datsun Sales Registered in Pierotti PMA</u>
San Jose Datsun	74	6.1%	41	3.8%
Down-town Datsun	85	7.1%	88	8.2%

(Note: There is a 10% to 15% error potential in the above figures.)

43. The Fremont auto row includes dealers in the following line makes: Ford, Lincoln-Mercury, Toyota, Chrysler-Plymouth, Volkswagen, and Buick. In close proximity to the auto row are Oldsmobile, Mazda, Chevrolet, AMC and Pontiac dealerships.

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3. Nissan assigns primary market areas (PMAs) to its dealers based upon an equidistant driving time between neighboring dealers, taking into account natural barriers and traffic patterns. The existing PMA lines became effective in January, 1980.

Facts Pertaining to Whether the Relocation of Hayward
Datsun Will be Injurious to the Public Welfare
[§ 3063(3)]

44. The average straight line distance between each of the 17 Bay Area Datsun dealers and the next closest dealer is 6.4 miles.

45. The following are the distances and drive times between the locations indicated:

<u>Location</u>	<u>Straight Line Distance (Miles)</u>	<u>Driving Distance (Miles)</u>	<u>Driving Time</u>
Present Hayward Datsun to Pierotti	8.4	8.8	19 minutes
Proposed Hayward Datsun to Pierotti	6.5	6.9	13 minutes
Present Hayward Datsun to San Leandro Datsun	5.7	9.0	11 minutes
Proposed Hayward Datsun to San Leandro Datsun	7.6	10.9	17 minutes
Present Hayward Datsun to Proposed Hayward Datsun	1.9	1.9	6 minutes

46. Hayward Datsun considered 13 or 14 sites in its search for a suitable location. Of the sites considered, only the two proposed locations and the former Doty Cadillac building are available. Nissan and Hayward Datsun deemed the former Doty

Cadillac facility unsuitable due to its age, inadequate size, and the fact that the necessary land parcels are owned by various individuals, under varying lease terms.

47. Nissan proposes to relocate Hayward Datsun to either 25497 Mission Boulevard or 25601 Mission Boulevard in Hayward. These properties are adjacent to each other.

48. The facilities at 25497 Mission Boulevard are currently being used to house the Chandler Ford dealership.

49. The Chandler Ford facility is owned by Sullivan and another partner and leased to Chandler Ford. If Hayward Datsun relocates to the Chandler Ford site, Hayward Datsun will sublease part of the premises. There is an agreement to do so among the parties, but the sublease was not executed at the time of the hearing.

50. If Hayward Datsun relocates to the Chandler Ford location, Hayward Datsun will build a new 5,000 square foot showroom for Nissan. There will be a minimum of 24 service bays in a 10,000 square foot service building for Nissan. The parts building will have between 4,000 and 5,000 square feet. Approximately two and one-half acres of land will be used. The proposed facilities will meet Nissan's guides.

51. The facilities at 25601 Mission Boulevard are currently being used to house Cooper Chrysler-Plymouth.

52. In the event Hayward Datsun relocates to the Cooper Chrysler-Plymouth location, it will be as a result of

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a buy-sell agreement in existence among the parties.^{4/} Hayward Datsun will become a dual-line dealership with Chrysler-Plymouth, but Datsun and Chrysler-Plymouth will have separate facilities. The present 7,500 square foot showroom will be used for Nissan, and a new showroom will be constructed for Chrysler-Plymouth. The location has three and one-half acres of land with 28,000 square feet of buildings. There are three service buildings on the property with a total of approximately 19,000 square feet. The property presently has 40 service stalls, including the body shop. Eight or ten additional stalls will be added. Twenty-four of the stalls will be used for Nissan. The proposed facilities will meet both Nissan and Chrysler-Plymouth requirements.

53. Regardless of which location is selected, Hayward Datsun will continue to employ the same 53 persons it presently employs.

54. Hayward Datsun presently operates a used car lot across the street from both proposed locations.

55. In the event Hayward Datsun is not permitted to relocate, the alternatives will be to continue at its present location or relocate to the former Doty Cadillac location. Neither facility meets Nissan's guides. Use of the present facility is the basis of lawsuits between Hayward Datsun and

4. The purchase of Cooper Chrysler-Plymouth will not occur unless Hayward Datsun relocates to that site. Testimony at the hearing indicated that, if the buy-sell does not occur, the creditors of Cooper Chrysler-Plymouth will begin foreclosure.

the property owners. The former Doty Cadillac facility is owned by the same person who owns the present Hayward Datsun facility.

56. Hayward Datsun's current facilities abut residential property, and neighbors have complained about noise.

57. A Cadillac dealership and a Honda dealership have recently relocated from near Hayward Datsun to points farther south on Mission Boulevard.

Facts Pertaining to Whether the Current Franchisees
in the Relevant Market Area are Providing Adequate
Competition and Convenient Consumer Care for
the Owners of Datsun Vehicles in the Market
Area, Including Adequate Motor Vehicle Sales and
Service Facilities, Equipment, Supply of Vehicle
Parts and Qualified Service Personnel
[§ 3063(4)]

Pierotti

58. Pierotti has nine service stalls in two Nissan service buildings which operate at about 75 percent capacity. Pierotti also has five service stalls in the Volvo service building, not all of which are in use, and two service stalls used for detail work.

59. Based upon the 1979 sales potential and the 1979 number of Datsuns in operation, Pierotti's present facility has only 50 percent of the service stalls required by Nissan, 38 percent of the service building space, and 57.6 percent of the total building space required by Nissan.

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60. Pierotti currently employs 51 people. Pierotti has a total of nine service technicians, six of whom do Datsun work and three of whom do primarily Volvo work. Two of the three Volvo technicians also do work on Datsuns if necessary.

61. Pierotti's service department is open Monday through Friday from 8:00 a.m. to 5:00 p.m.

62. At the time of the hearing, Pierotti had new Datsun vehicle inventory of approximately \$800,000. In June 1981, Pierotti's new Datsun vehicle inventory totaled \$1.5 million.

63. Pierotti's Datsun parts inventory is valued at \$165,000.

Hayward Datsun^{5/}

64. The service area at Hayward Datsun's present location amounts to only 38.9 percent of Nissan's requirements and contains only ten of the twenty stalls required by Nissan.

65. Some of Hayward Datsun's parts inventory is stored in an attic above the showroom, an area not designed for parts storage. Additionally, parts are stored in two rental sheds a mile away, three truck trailers in the rear of the facility, and one other truck trailer at an off-site location.

66. The men's restroom on the Hayward Datsun premises is used by both customers and mechanics.

5. See Paragraph 34, supra.

1980-CARS

	<u># of Datsuns Registered in Dealer's PMA</u>	<u>Total Dealer Datsun Sales</u>
Pierotti	1067	737
Hayward Datsun	646	947
San Leandro Datsun	637	1344 ^{6/}

1980-TRUCKS

	<u># of Datsuns Registered in Dealer's PMA</u>	<u>Total Dealer Datsun Sales</u>
Pierotti	241	176
Hayward Datsun	158	205
San Leandro Datsun	116	109 ^{6/}

71. There are 55 Datsun dealers in Nissan's San Francisco region. Of these, 13 are in the East Bay Area designated by Nissan as R-2.

72. In 1980, in the San Francisco region, Nissan achieved a 20.6 percent penetration of the import car market and achieved a 20.5 percent penetration of the import truck market.

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6. In 1980, San Leandro Datsun had 755 fleet sales (cars and trucks). If these fleet sales were deducted from San Leandro's total Datsun sales in 1980, San Leandro Datsun would have sold approximately 50 fewer vehicles than were registered in its PMA.

73. In 1980, Pierotti did not achieve sales equal to Nissan's regional penetration. In 1980, Pierotti sold 737 Datsun cars and 176 Datsun trucks for a total of 913 vehicles. Had Pierotti been able to sell at a rate equal to the regional penetration of the import market, Pierotti would have sold 923 Datsun cars and 230 Datsun trucks for a total of 1,153 vehicles.

74. As demonstrated by the number of Datsun registrations into Pierotti's PMA, and the fact that Pierotti's total sales are substantially less than the regional average penetration, Pierotti has the opportunity to increase its sales above its present level.

75. Pierotti's average gross profit per new Datsun retailed is one of the highest of any of the 55 Nissan dealers in the San Francisco region. The following indicates Pierotti's average gross profit per new vehicle retailed:

	<u>Pierotti</u>		
	<u>Datsun Average Gross Profit-Retail</u>	<u>Datsun Average Gross Profit-Fleet</u>	<u>Volvo Average Gross Profit</u>
1979	\$ 824	\$ 659	\$ 744
1980	1,061	786	932

76. The average gross profit during 1980 for the entire San Francisco Metropolitan market area was \$918 per new Datsun vehicle retailed.

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Determination of Issues

Protestant has failed to prove that there is good cause for not relocating Hayward Datsun, in that:

- a) Protestant proved that its investment is permanent, but failed to prove that its investment will be adversely affected;
[§ 3063(1)]
- b) Protestant failed to prove that the relocation will have an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area; [§ 3063(2)]
- c) Protestant failed to prove that the relocation will be injurious to the public welfare;
[§ 3063(3)]
- d) Protestant failed to prove that there is adequate competition and convenient consumer care for the owners of Datsun motor vehicles in the market area including adequate motor vehicle sales and service facilities, equipment, supply of vehicle parts and qualified service personnel; [§ 3063(4)] and
- e) Protestant failed to prove that the relocation would not increase competition and failed to prove that the relocation would not be in the public interest [§ 3063(5)].

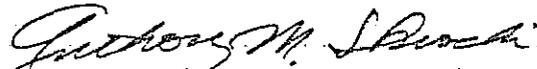
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The following proposed decision is respectfully submitted:

The Protests are overruled. Nissan is permitted to relocate Hayward Datsun to either of the proposed locations.

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 dates and recommend its adoption as the decision of the New Motor Vehicle Board.

DATED: November 20, 1981



ANTHONY M. SKROCKI
Administrative Law Judge
New Motor Vehicle Board

