

DARLING’S,)
Petitioner,)
vs.) M.V.Bd No. 06-01
FORD MOTOR COMPANY,)
Respondent,)

FINDINGS OF FACT

1. Petitioner Darling’s (“Darling’s”) is a corporate entity, of which John Darling is the President and majority shareholder. Darling’s owns the Ford dealership at issue in this case, as well as other dealerships.

2. John Darling is generally familiar with 10 M.R.S.A. §§ 1171, *et seq.* (the “Dealer Act”) and he is specifically familiar with section 1174(3)(B) of the Dealer Act, the statute at issue in Count X of the pending Complaint..

3. Ford’s Blue Oval Certified program (“BOC”) is customer-satisfaction incentive program introduced in 2000. One feature of BOC was a cash bonus to dealers of 1.25 percent of the manufacturer’s suggested retail price on each vehicle that the dealer sold (the “Cash Bonus”).

4. Dealers could qualify for BOC status by meeting objective standards set by Ford. These standards included Voice of the Customer or VOC approval ratings. Not all Dealers were BOC Dealers. Only those Dealers who met each year’s VOC ratings were entitled to the Cash Bonus.

5. Darling’s was certified as a BOC Dealer at the beginning of the program and never lost that status.

6. John Darling was aware, beginning in 2002 that a reduction to the Cash Bonus was under consideration, and that Ford was stating that it viewed the original BOC

program as having no more than a five-year life span. John Darling wrote to Ford twice in 2002, urging that Ford “kill the entire Blue Oval cash incentive program, immediately.” Mr. Darling wrote these letters in part because he felt that the program had inspired discontent among some members of the dealer body and had been challenged in some states as two-tier pricing.

7. John Darling was aware in early 2004 that Ford was discussing the discontinuation of the Cash Bonus and its replacement with a sales-incentive bonus, and both Mr. Darling and Darling’s General Manager Ron Russell were involved in discussions with then-Dealer Council representative David Philipkoski on that topic.

8. Mr. Darling was opposed to the proposed change and communicated his position to Mr. Philipkoski. Mr. Darling was surprised at the idea of a proposed change and stated that he was surprised that “they were changing the program.”

9. Ford announced in 2002 that written communication from Ford to dealers would thereafter be posted on the Internet web site <http://www.fmcdealer.com> (the “Site”). Before 2002, such communications had already been made electronically but had been posted to three different web sites. Changes and improvements in technology had rendered electronic communications faster, more reliable and more efficient than, for example, communications transmitted by mail.

10. Ford communicates important messages to dealers via Electronic Field Communications (“EFC”), which are posted on an Internet web site accessible by the dealers. Various Darling’s personnel monitor EFCs as appropriate given their respective duties.

11. On August 12, 2004, Ford issued an EFC alerting dealers to a Fordstar broadcast that would be held on August 20. Mr. Darling assumes that his dealership received this EFC.

12. The August 12, 2004 EFC stated that it was regarding, *inter alia*, “the 2005 Blue Oval Certified program,” and that at the conclusion, the President of Ford Division would “announce the 2005 BOC Program to all Ford Dealers.”

13. On August 18, 2004, an e-mail from Mr. Philipkoski urged John Darling, among others, to watch the August 20 broadcast regarding “the new BOC Program.”

14. On August 20, 2004, Ford held the scheduled Fordstar broadcast. The broadcast referred that Ford had “announced in December 2002 that the division would transition BOC to a recognition-based program emphasizing non-cash benefits,” and that “at the same time we stated that we would extend the current program until March 31, 2005.”

15. The August 20, 2004 broadcast went on to confirm, *inter alia*, that the Cash Bonus would end after March 31, 2005, and that a new sales-incentive program would be introduced. Mr. Darling is relatively sure that someone at Darling’s watched the broadcast, which would be something of interest to the dealership.

16. On August 24, 2004, Ford issued an EFC following up on the August 20 broadcast. The EFC referenced the broadcast, and stated, *inter alia*, “[a]s you are aware, the current Blue Oval Certified program and associated 1.25% bonus payment *will conclude* on March 31, 2005.” The EFC also noted that a new sales-incentive program would be implemented.

17. On December 17, 2004, Ford issued another EFC reiterating that the Program and the 1.25% commission would end on March 31, 2005. John Darling has no reason to believe that the EFC was not posted on the Internet web site.

18. The December 17, 2004 EFC stated, *inter alia*, “[t]he current Blue Oval Certified program *will be* discontinued on March 31, 2005 along with the associated 1.25 percent of MSRP Blue Oval Certified bonus payment.”

19. Mr. Darling agrees that this statement would transcend a mere proposal and would make it clear to anyone who read it that “Ford was saying that the 1.25 percent was going to go away.”

20. At no time before April 1, 2005 did Ford ever send any certified mail notice to Darling’s that it would be modifying the Cash Bonus program by terminating the payments.

21. The Cash Bonus was discontinued effective April 1, 2005.

22. After April 1, 2005 Ford had alternative sales-incentive programs called the "Accelerated Sales Challenge." The Accelerated Sales Challenge was followed by a similar incentive program called the "First Quarter Sales Drive," which lasted from January through March, 2007. That program was followed by a similar program called the "Second Quarter Sale Drive," which lasted from April through June, 2007. That program was followed by a similar program called the "Third Quarter Sales Drive," which lasted from July through September, 2007. That program was followed by a similar one called the "Fourth Quarter Sales Drive," which lasted from October through December, 2007.

23. Ford still has not mailed any certified mail notice to Darling's of the discontinuance of the Cash Bonus.

24. One and one quarter per cent of the Manufacturer's Suggested Retail Price of the cars sold by Darling's from the date of the discontinuance of the Cash Bonus to November 30, 2007 equals \$678,942,96.

25. Darling's received \$142,975.00 in 2005-07 under the Accelerated Sales Challenge Program: \$63,875.00 in 2005, \$69,800.00 in 2006, and \$9,300.00 in 2007.

26. In 2007, Darling's received \$9,600.00 under the First Quarter Sales Drive; \$20,800.00 under the Second Quarter Sales Drive; \$34,800.00 under the Third Quarter Sales Drive; and \$9,000.00 under the Fourth Quarter Sales Drive.

27. The Blue Oval Certified Program was described in Reference Guides that were issued and updated on the following dates: March 14, 2001, June 21, 2001, February 26, 2002, March 14, 2002, July 23, 2002, February 24, 2003, October 7, 2003, and December 9, 2004. These Guides identified Certification Requirements for each year of the program and did not describe those beyond so-called Year Five, which was identified as ending on March 31, 2005. The December 9, 2004 Reference Guide contained no provision for future Certification Requirements.

28. The Reference Guides were not delivered by certified mail. Ford announced

upcoming distribution of revised Reference guides via Electronic Field Communications to dealers, of the type described above. The Reference Guides were then distributed to dealers by mail. Findings of Fact ¶¶ 1 through 28 are based upon the parties' Stipulations.

29. Both Ford and Darling's offered expert testimony. Ernest R. Tyler, CPA, testified for Darling's that the profit margin of automobile dealers was 5 to 6 %, and that BOC payments by Ford made up 1.25, or 20 % of that profit margin. He defined return on investment as net income and testified that the loss of the BOC had had a substantial and adverse affect on Darling's return on investment. (Ex. 12, T. 178-193). Tyler testified that cash is king in the auto industry and Marc Powers totally agreed. (T. 175, 361)

30. Ford offered the testimony of Marc Powers, CPA and Certified Valuation Analyst. His testimony and reports indicate that the loss of the BOC reduced Darling's return on investment .9 % pre-tax, or .6% after-tax. He defined return on investment as net income divided by investment and testified that the loss of the BOC did not have a substantial affect on Darling's investment or its return on investment. (T. 353, 377, passim.)

CONCLUSIONS OF LAW

1. Ford's Motion for Judgment as a Matter of Law was denied. This is not a case where the Motor Vehicle Franchise Board Rules required more notice than the statute mandates. See *American Automobile Manufacturers Assoc. v. Public Service Comm. Of Delaware and Delaware Automobile and Truck Dealers Association*, 1998 Del. Super. LEXIS 176 (1998). The Legislature itself required Ford to give Darling's notice by certified mail. Title 10 § 1174 states.

The following acts shall be deemed unfair methods of competition and unfair and deceptive practices. It shall be unlawful for any:

3. Certain interference in dealer's business. Manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division, or officer, agent or other representative thereof:

... or by threatening *or attempting* to modify a franchise during the term of the franchise or upon its renewal, if the modification substantially and adversely affects the motor vehicle dealer's rights, obligations, investment or return on investment, without giving *90 days'* written notice *by certified mail* of the proposed modification to the motor vehicle dealer, unless the modification is required by law or *board* order. Within the 90-day notice period, the motor vehicle dealer may file with the board and serve notice upon the manufacturer a protest requesting a determination of whether there is good cause for permitting the proposed modification. The manufacturer has the burden of proving good cause. The board shall promptly schedule a hearing and decide the matter within 180 days from the date the protest is filed. Multiple protests pertaining to the same proposed modification must be consolidated for hearing. The proposed modification may not take effect pending the determination of the matter. In determining whether there is good cause for permitting a proposed modification, any relevant factors must be considered, including, but not limited to:

- (1) The reasons for the proposed modification;
 - (2) Whether the proposed modification is applied to or affects all motor vehicle dealers in a nondiscriminatory manner;
 - (3) Whether the proposed modification will have a substantial and adverse effect upon the motor vehicle dealer's investment or return on investment;
 - (4) Whether the proposed modification is in the public interest;
 - (5) Whether the proposed modification is necessary to the orderly and profitable distribution; and
 - (6) Whether the proposed modification is offset by other modifications beneficial to the motor vehicle dealer.
- Notice in good faith to a motor vehicle dealer of that dealer's violation of the terms or provisions of the franchise or contractual (emphasis added)

2. Ford has agreed that it did not send Darling's certified mail notice of the end of the BOC. The language emphasized above was added in 2003. (Comm. Amend. A. to S.P. 425, L.D. 1294, 121st legis.2003). The words of the section are clear and specific in requiring 90 days' notice by certified mail. The Maine Legislature saw fit to require notice by a specific, although hardly onerous, means.

3. This Board cannot say that the Legislature intended for constructive or any other form of notice to suffice. "Where, as here, the words of a statute are clear and unambiguous, we are not empowered to disregard the letter of the statute under the pretext of pursuing its spirit." *Wilderness Industries of Maryland, Inc., v. Commonwealth of*

Pennsylvania, State Board of Motor Vehicle Manufacturers, Dealers and Salesmen and Dean Fountain Camper Sales, 58 Pa. Commw. 127; 427 A.2d 1235; (1981 Pa. Commw.)

4. Nor is strict construction of such notice statutes unusual. *Nissan Division of Nissan Motor Corporation in U.S.A. v. Fred Anderson Nissan, Paul S. Meeker, and Meeker Lincoln-Mercury Inc.*, 337 N.C. 424, 445 S.E.2d 600 (1994 N.C.), holding that service by Federal Express was insufficient when the statute required certified mail; *Department of Motor Vehicles and Public Safety of Nevada; Ford Motor Company vs. Jones-Westford, Inc.*, 114 Nev. 766; 962 P.2d 624 (1998 Nev.), notice was insufficient when it did not provide an exact date of termination, and *British Motor Car Distributors v. New Motor Vehicle Board; British Motors of Monterey, Inc.*, 194 Cal. App. 3d 81, 239 Cal. Repr. 280 (1987), under a California provision which parallels 10 § 1174, where the manufacturer's notice of termination was deficient, the dealer's protest fifteen months later was timely.

5. The word franchise is defined in the statute as an oral and written arrangement in which a manufacturer licenses a new car dealer to use a trade name and where there is a community of interest in the marketing of motor vehicles. But the legislature used the word franchise more than 60 times in chapter 204.¹ In short, the term franchise covers the entire business relationship between the manufacturer and the dealer. This Board finds that when Ford ended the BOC it modified Darling's franchise under § 1174 (3) B.

6. The next question is whether that change substantially and adversely affected Darling's rights, obligations, investment or return on investment. *Webster's New World Dictionary*, Second College Edition, 1980, defines adverse as unfavorable. The Board

¹It appears at least once as a verb. 1182-A. As a noun franchise is used to mean the parties' arrangement, 1171(6), 1174(3)(C, I and R), the written franchise agreement, 1174(3)(B), 1174(3)(P), 1174(3)(Q)(2), 1178 and 1183, the business entity operated by the dealer 1174(3)(M) and 1174(3)(Q), the real estate occupied by the dealer, 1174(3)(I) and 1174-A. Franchise is used as another word for the parties' arrangement or agreement in sub paragraphs (A), (B), (O), (P), of section 1174(3) and 1178. Finally, the word franchise is also used to characterize the parties' relationship, sub paragraphs (Q), (R), and (S) of section 1174(3).

accepts that definition and finds that the end of the BOC had an adverse affect on Darling's.

7. The closer question was whether the affect of that change was substantial. The statute does not define the word substantial, but courts have done so in contexts similar to the present one.

8. Whether or not a change is a "substantial modification of the franchise agreement..." is a mixed question of law and fact. *Wright-Moore Corp., v. RICOH Corp.*, 908 F. 2D128, 140 (7th cir., 1990) At least one court discussed this issue at some length. In *Hi-Tech Motors, Inc., Gunder McCombs and Sue McCombs v. Bombadier Motor Corporation of America*, 2005 MT 187; 328 Mont. 66; 117 P.3d 159, the issue was whether a franchise existed between a manufacturer and a dealer. Their relationship would be considered a franchise if the dealer was "substantially reliant" on the manufacturer for a continuing supply of the vehicles it sold. The lower court had held that "'substantial' means 'essential,' 'significantly great' or 'largely but not wholly that which is specified.'" Based on that definition the lower court held that the dealer would have to generate 50% or more of its revenue from the sale of that manufacturer's vehicles in order for it to be substantially reliant on that manufacturer. The supreme court of Montana rejected that narrow definition of substantial and reversed the lower court. It faulted the lower court for ignoring definitions of " 'substantial' such as 'consisting of or relating to substance' and 'not imaginary or illusory, real, true,'" and held that the lower court had applied "an unnecessarily restrictive and simplistic standard..." (§ 42, § 44)

9. The Board accepts the testimony of Ernest R. Tyler as establishing that Ford's termination of the BOC substantially affected Darling's return on its investment. The experts agreed that cash is king in the business. BOC substantially affected Darling's profits and cash flow.

10. Ford correctly argued that § 1174 (3) "Certain interference in dealer's business," does not prohibit a manufacturer from making changes. Indeed, given 90 days' notice by certified mail, Ford can modify the franchise, subject to a dealer protest. A dealer may timely file a protest, "requesting a determination of whether there is good cause for

permitting the proposed modification,” and Ford must establish to the Board that there is good cause. The statute defines good cause broadly and sets out six elements.

In determining whether there is good cause for permitting a proposed modification, any relevant factors must be considered, including, but not limited to:

- (1) The reasons for the proposed modification;
- (2) Whether the proposed modification is applied to or affects all motor vehicle dealers in a nondiscriminatory manner;
- (3) Whether the proposed modification will have a substantial and adverse effect upon the motor vehicle dealer's investment or return on investment;
- (4) Whether the proposed modification is in the public interest;
- (5) Whether the proposed modification is necessary to the orderly and profitable distribution; and
- (6) Whether the proposed modification is offset by other modifications beneficial to the motor vehicle dealer. (emphasis added) § 1174 (3)

11. The statute requires 90 days' notice in order to enable the Board to determine whether the manufacturer has good cause before it implements the modification. In determining whether the manufacturer has good cause, the affect of the modification on the dealer is only part of the Board's enquiry. The elements set out above present a broad question which includes the manufacturer's need for the modification, its reasons for making the modification, the affect on the public interest, whether the modification affects all dealers and whether it is offset by other benefits to the dealer.

12. In contrast, when the manufacturer does not give notice, but unilaterally makes the change, the only issue is whether the statutory notice was required. In determining whether such notice was required, the only enquiry is whether the "...modification substantially and adversely affects the motor vehicle dealer's rights, obligations, investment, or return on investment..." When Ford failed to provide the required notice and Darling's petitioned, the only question was whether the modification substantially and adversely affected Darling's "...rights, obligations, investment, or return on investment..." and thus had required notice by certified mail.

13. Ford knowingly failed to provide the notice required by the legislature. In so doing Ford violated §1171(3) (B) of the franchise law, and a civil penalty is required by that section. In determining the amount of the civil violation, the Board rejected Darlings' argument that each 60 day period since Ford ended the BOC, constituted a separate civil violation which required a separate a civil penalty. The Board unanimously found that Ford had purposefully violated the statute once, when it failed to give notice of the proposed change as required by the statute.

14. Ending the BOC substantially and adversely affected Darlings' return on investment. Ford made no efforts to correct the violation; indeed, Ford decided that it need not comply with the notice provisions of § 1174 (3) B. In order to deter future violations, the Board imposed the maximum civil penalty of \$10,000.

15. The Board found that Darling's had sustained nine months' damages under 1174(3); it limited the damages to the 90 day notice period and the 180 day adjudication period contained in § 1174 (3) B.

16. Based upon Exhibit 49-1, Darlings lost \$214, 723.08, in the first 270 days after April 1, 2005. But during that same period it earned \$68, 875.00 from other promotional programs. Ford is ordered to pay Darling's the difference, \$150, 848, pursuant to § 1171-B (3) of the Franchise Law.

17. Darling's prevailed in this matter and § 1173 of the Act requires that the Board award Darling's its attorney's fees and its costs.

18. At a Public meeting of the Maine Motor Vehicle Franchise Board at the Bureau of Motor Vehicles on May 12, 2008, Board members Bill Sowles, John Knight, Bud Morrison, Bill Dowling and John McCurry, adopted this decision.

WHEREFORE, Darling's Petition is GRANTED as set forth above; Ford is ordered to pay a \$10,000.00 civil penalty to the Highway fund, it is ordered to pay \$150, 848.08, in damages and attorney's fees and costs to Darling's.

So Ordered

Dated

John C. McCurry, Chairman