



STATE OF CALIFORNIA

DECISION COVER SHEET

ACTION BY: Public Members Only

ACTION BY: All Members

To : BOARD MEMBERS

Date: June 13, 2024

From : ROBIN PARKER
(Summarizing OAH ALJ Wim van Rooyen's Proposed Decision)

CASE: KPAUTO, LLC, dba PUTNAM FORD OF SAN MATEO v. FORD MOTOR COMPANY
Protest No. PR-2759-21

TYPE: Vehicle Code section 3065.4 Retail Labor Rate

PROCEDURAL SUMMARY:

- FILED ON CALENDAR: December 30, 2021
- PRE-HEARING MOTIONS FILED:
 - Respondent's Motion to Amend Pre-Hearing Conference Order (granted in part, denied in part)
 - Respondent's [subsequent] Motion to Amend Pre-Hearing Conference Order (granted in part, denied in part)
 - Putnam Nissan's Motion to Quash or in the Alternative for Protective Order (denied)
 - Respondent's Motion to Compel Production of Documents (granted)
 - Respondent's Request for Sanctions (denied without prejudice)
 - Protestant's Request for Sanctions (denied)
 - Respondent's Motion to Exclude Edward M. Stockton's Untimely Expert Rebuttal Report (denied)
 - Respondent's Motion for Protective Order (denied)
 - Respondent Ford Motor Company's Second Motion to Compel (no ruling was issued by the Board as the parties were to meet and confer. This matter was handled by OAH)
- OAH HEARING: September 18-21, 25-28, 2023 (8 days)

- COUNSEL FOR PROTESTANT: Gavin M. Hughes, Esq.
Robert A. Mayville, Jr., Esq.
Law Offices of Gavin M. Hughes
- COUNSEL FOR RESPONDENT: Steven M. Kelso, Esq.
Gwen J. Young, Esq.
H. Camille Papini-Chapla, Esq.
April C. Connally, Esq.
Elayna M. Fiene, Esq.
Greenberg Traurig, LLP

EFFECT OF PROPOSED DECISION: The Proposed Decision overrules Protestant’s retail labor rate protest.

SUMMARY OF PROPOSED DECISION:

- This protest initially proceeded before the Board for purposes of all discovery and law and motion matters. On May 18, 2023, the Board transferred this case to the Office of Administrative Hearings (“OAH”) to conduct a hearing on the merits.
- Protestant challenges respondent’s denial of protestant’s request to increase its hourly warranty labor rate from \$177 to \$436.76 and respondent’s proposed alternative rate of \$220.
- On July 15, 2021, protestant hired FrogData to assist protestant with preparing a warranty labor rate increase request to respondent. FrogData is a “warranty uplift” vendor. As permitted by statute, it pulls data from the franchisee’s database and selects a set of repair orders most favorable to the franchisee to submit in support of a warranty labor rate increase request.
- FrogData relies on the franchisee’s repair orders as source documents. It verifies that repair lines relate to qualified repairs and ensures that the data in the warranty labor rate increase request matches the repair order data. It does not question the accuracy of the repair order data or how the franchisee determined the actual hours or sold hours reflected on repair orders.
- In a letter dated July 28, 2021, and submitted electronically on August 24, 2021, protestant notified respondent of protestant’s request to increase its hourly warranty labor rate to \$436.76. The request was accompanied by accounting copies of 250 repair orders opened in the 90-day period from March 10 to June 7, 2021, containing 1,006 total repair lines (“Initial Submission”). From the Initial Submission, protestant identified 41 repair lines across 25 repair orders as involving qualified repairs. Protestant computed that the total sold hours associated with those qualified repairs were 46.8, and the total labor charges associated with those qualified repairs were \$20,440.55. It then divided the total labor charges by the sold hours, which resulted in an average retail labor rate of \$436.76.

- On September 20, 2021, respondent requested a supplemental set of repair orders from protestant. Respondent noted that protestant’s submission for retail labor rate is substantially higher than its current warranty rate. As such, respondent requested accounting copies of all repair orders closed within the period of 30 days immediately following the set of repair orders submitted by protestant.
- On September 27, 2021, protestant submitted the requested supplemental set of repair orders. The supplemental set consisted of 168 repair orders opened in the 30-day period from June 8 to July 7, 2021, containing 667 total repair lines (“Supplemental Submission”) (collectively with the Initial Submission, the “Submission”). From the Supplemental Submission, 31 repair lines across 19 repair orders involved qualified repairs.
- On October 26, 2021, respondent notified protestant that respondent contested the requested warranty labor rate increase because it was materially inaccurate or fraudulent.
 - Respondent was unable to verify the labor rates protestant was charging at its dealership.
 - Many of the customer paid labor hours do not align with the work performed and the technician clocked hours often indicate a repair much different than the customer paid hours reported.
 - Respondent noted that the requested rate seems not to be based on customer quoted hours, or technician recorded time, but rather on a desire to attempt to demonstrate an inordinately high labor rate of approximately \$440.00 per hour, which is generally around double the rate being charged in the market by other dealers of any other brand.
 - The inconsistencies and excessive customer charges in the repair orders submitted make it unreasonable, if not effectively impossible, for respondent to calculate a labor rate.
 - Respondent proposed an adjusted retail labor rate of \$220.00 per hour as it seems to be the most common customer pay rate the documentation shows in repairs.
- Respondent offered evidence of multiple inconsistencies, discrepancies, and irregularities in protestant’s Submission. Respondent primarily relied on the data in protestant’s own repair orders as supplemented by the testimony of respondent’s witnesses.
- The specific inconsistencies, discrepancies, and irregularities identified by respondent include the following:
 1. Dividing protestant’s customer labor charges by the sold hours creates impossible hourly rates.
 2. The large discrepancies between actual hours and sold hours.
 3. Customer labor charges associated with zero sold hours.
 4. Customer labor charges associated with zero actual hours.
 5. The presence of flat rate charges.

The ALJ noted that any other inconsistencies, discrepancies, and irregularities identified by respondent were not established by a preponderance of the evidence.

- Protestant did not offer testimony from any of its service advisors, service managers, or technicians.
- Kent Putnam, the dealer principal, explained that protestant does not charge customers for customer-pay repairs based on actual hours of labor. That is because protestant must provide the customer with an estimate, which the customer must agree to pay before repair work is performed.
- Mr. Putnam testified that he instructed protestant's service manager and service advisors to implement the following policy for customer-pay repair pricing: the service advisor first looks up the hours for the particular repair suggested by respondent's factory time guide and enters those hours as the sold hours for the repair line. The sold hours are then multiplied by an hourly rate of \$440 to generate the associated customer labor charge. According to Mr. Putnam, the policy was designed to ensure pricing uniformity by using the factory time guide for both warranty and customer-pay repairs.
- However, Mr. Putnam acknowledged that the sold hours in the Submission did not always match respondent's factory time guide. He admitted that service advisors had discretion to change the sold hours for repairs, although he "would expect that 440-an-hour labor rate to hold."
- Mr. Putnam could not explain the impossible hourly rates extending beyond dollars and cents, nor the customer labor charges associated with zero sold hours or zero actual hours in the Submission.
- Andrey Kamenetsky, the chief financial officer and group operations manager for Putnam Automotive Group, also initially testified that protestant priced labor on customer-pay repairs by multiplying the sold hours based on respondent's factory time guide by an hourly rate of \$440. However, he later testified that service advisors were not required to use respondent's factory time guide.
- Respondent's expert, Suzanne Engel Heinemann, believed that protestant's sold hours were either "arbitrary" or "otherwise unrelated to the actual work undertaken." In any event, they were independent of the customer labor charges. Accordingly, they were not an accurate reflection of the hours that generated the customer labor charges for qualified repairs. Ms. Heinemann opined that protestant's Submission and determination of its retail labor rate are materially inaccurate, primarily because the Submission's sold hours are not an accurate measure of the hours that generated the customer labor charges for qualified repairs. She believed the inaccuracy was material.

- Protestant's expert, Ted Stockton of The Fontana Group, appeared generally unfamiliar with the repair orders' contents and data during the hearing. He disclaimed forming any opinion regarding whether protestant's Submission complied with Vehicle Code section 3065.2 or whether the Submission was materially inaccurate. Nor did he offer an opinion regarding what an appropriate retail labor rate for protestant should be.
- The ALJ determined that respondent has shown by a preponderance of the evidence that protestant's Submission and determination of its retail labor rate are materially inaccurate. Primarily relying on protestant's own repair orders, as supplemented by the detailed, thorough, and credible testimony of Messrs. Becic, Kanouse, and Sweis, respondent identified numerous inconsistencies, discrepancies, and irregularities in the Submission. Those include the impossible hourly rates that could not plausibly be entered into the repair order system; the large discrepancies between actual hours and sold hours; customer labor charges associated with zero sold or actual hours; and the presence of flat rate charges.
- The parties urged decision of a broader issue of statutory construction as Vehicle Code section 3065.2 refers to hours that generated those charges but does not define that phrase. It thus raises the question of whether the statute requires the use of actual or sold hours in its calculation.
 - Respondent contends that actual hours are the hours that reflect the work done and thus generate the customer labor charges.
 - Protestant contends that using sold hours is more appropriate because they are routinely used in the industry to price customer-pay repairs.
- Without deciding this question, even assuming that sold hours are appropriate to use in a calculation under Section 3065.2, the sold hours in the Submission here are materially inaccurate. Thus, the Protest can and should be resolved on that narrow ground alone.
- Respondent also contends that protestant's Submission and determination of its retail labor rate are fraudulent. According to respondent, the evidence shows that protestant intentionally manipulated the sold hours in the Submission to demonstrate an effective hourly retail labor rate of around \$440. Although that is one possible inference that could be drawn from the evidence, drawing it is not necessary to decide this Protest. Section 3065.2 requires respondent to demonstrate either material inaccuracy or fraud. Having decided that protestant's Submission and determination of its retail labor rate are materially inaccurate, it is unnecessary to reach the issue of fraud.
- Beyond showing material inaccuracy, respondent also demonstrated by a preponderance of the evidence that it otherwise complied with the requirements in Section 3065.2.

- Section 3065.4 confers discretion on the Board to calculate and declare an appropriate retail labor rate under section 3065.2. Here, given the material inaccuracy of the Submission's data, that discretion is more reasonably exercised by declining to calculate and declare a rate. Although Ms. Heinemann used her best efforts to calculate an appropriate retail labor rate, she acknowledged the underlying data's deficiencies and imperfections. Thus, the prudent course of action is to overrule the Protest and allow protestant to file a new warranty labor rate increase request that is not materially inaccurate.
- The ALJ denied Respondent's request that, upon overruling the Protest, the Board declare that protestant's original hourly warranty labor rate of \$177 is still in effect and order protestant to reimburse respondent for all warranty labor hours paid in excess of \$177 per hour.
 - Section 3065.4 only authorizes an award of the difference between what the franchisee has actually received and what the franchisee would have received if the franchisor had compensated the franchisee at the retail labor rate determined under section 3065.2.
 - Because the Board declines to independently calculate an appropriate retail labor rate under section 3065.2, there is presently no difference to award under the statute.
 - Additionally, under section 3065.2, subdivision (d)(2), if protestant had not filed the Protest, respondent's proposed adjusted retail labor rate of \$220 would have become effective. That is the rate that respondent has presumably been paying through the present. Thus, respondent has not shown by a preponderance of the evidence that it is entitled to the requested declaratory relief and/or reimbursement.

RELATED MATTERS:

- Related Protest: Protest No. PR-2826-23 *KPAuto, LLC, dba Putnam Ford of San Mateo v. Ford Motor Company*
- Related Case Law:
 - *People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.
 - *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67.
 - *Nevarov v. Caldwell* (1958) 161 Cal.App.2d 762, 777.
 - *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.
 - *Kearl v. Bd. of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.
 - *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1433.
 - *Dobbs v. Jackson Women's Health Organization* (2022) 597 U.S. 215, 348 (conc. opn. of Roberts, C.J.)
 - *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238.

- *County of Kern v. Alta Sierra Holistic Exchange Service* (2020) 46 Cal.App.5th 82, 101.
- Applicable Statutes:
 - Evidence Code sections 115, 780.
 - Vehicle Code sections 331.1, 331.2, 3065, 3065.2, 3065.4, 3066.