STATE OF VERMONT
WINDSOR COUNTY, SS.

STEWART MARTON and ANN MARTEL-MARTON, Appellees, v. NISSAN MOTOR CORPORATION U.S.A., Appellant	: : : : : : : : :	WINDSOR SUPERIOR COURT DOCKET NO. S186-4-96 WrCv

DECISION AND ORDER

This matter came before the court for hearing on July 21, 1997. The Appellant Nissan Motor Corporation was represented by Peter Young, Esq. The Appellees were present and were represented by Karen Creighton Borgstrom, Esq.

Following the evidentiary hearing, Appellee filed a Motion for Judgment as a Matter of Law under Rule 50(a). Appellant filed a memorandum in opposition. The Motion is denied. Appellant introduced sufficient testimony to support a viable case on appeal. Therefore, the court does not issue judgment on grounds that the Appellant has not presented a justiciable appeal. Resolution of the case requires the court to make findings based on conflicting factual testimony, and to weigh the credibility of witnesses. Therefore, based on the evidence admitted, including the testimony of witnesses and the exhibits, the court makes the following Findings and Conclusions.

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FINDINGS OF FACT

Appellees purchased a Nissan vehicle, and after a considerable period of having problems with repairs, filed a Demand for Arbitration with the New Motor Vehicle Arbitration Board to seek relief under the "lemon law". The matter was originally scheduled for a hearing before the Board on February 29, 1996. The Board subsequently rescheduled the hearing for March 14, 1996 at 3:00 p.m. The Notice of Hearing dated February 26, 1996 showed a series of hearings scheduled for that day, with this case scheduled last. Several cases had assigned time slots, and in addition there was a group

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of cases that were listed without specific times, to be called if other cases were cancelled five days ahead, and they could be advanced to a specified hearing slot. In two prominent places on the Notice of Hearing were the words: "NOTE: TIMES ARE APPROXIMATE & SUBJECT TO CHANGE". It is apparent from the notice that the protocol is that cases will be taken in the order in which they appear on the Notice, and that if possible when cases are cancelled, other cases would be advanced to take advantage of the available hearing time before the Board.

Nissan Motor Corporation has had several cases before the Board in the past. The Rules promulgated for use by the Board have several provisions relative to notice of hearings. Rule 8 provides that the parties will be notified of the date, time, and place of the hearing by mail. Pauline Liese has been the administrator for the Board for several years. Hearing notices were originally mailed to vehicle manufacturers according to the rules, but after several complaints from manufacturers that they were not receiving the notices in time, Ms. Liese began sending the notices of hearing to manufacturers by fax. Many of them are located out of state (Nissan offices are in New Jersey), and sending notices by fax proved to be much more satisfactory. Ms Liese has never received any complaints from manufacturers that the use of fax notices failed to provide adequate notice. Nissan has received notice of several hearings in the past by fax, and has never objected to the procedure. Despite the change in practice, no change has been made in the rules.

Another one of the Board rules, Rule 19, provides that the burden of proof is on the manufacturer to prove as an affirmative defense that the alleged defect does not substantially impair the use, market value, or safety of the vehicle. The consumer then may introduce evidence to rebut the manufacturer's case. Rule 24 provides that if a party fails to appear for the hearing, the Board may permit the other party to present evidence, and may then issue a decision on the basis of that evidence alone.

Prior to March 14, 1996, there were several telephone communications between Nissan and the Appellees and the Board, and it was not clear whether the case would proceed to hearing, but by March 13, 1996, it had become clear to both parties that the case would be proceeding to hearing.

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Due to changes regarding other cases scheduled for that day, Ms. Liese, the Program Specialist responsible for the administrative processes of the Board, rescheduled the hearing time for 12:30 p.m. on March 14, 1997. This occurred at approximately 3:45 p.m. on March 13, 1997.

William Fennelly was the representative at Nissan in New Jersey who was responsible for this case. On March 13th, in the late afternoon, he confirmed with a Nissan technical specialist and representative, Carlos Ferreira, that Mr. Ferreira would be travelling to Vermont to appear at the hearing on behalf of Nissan. Mr. Fennelly also called the Board office and confirmed that Nissan would be attending the hearing, but during the conversation, he misstated the date of the hearing as March 18 rather than March 14.

Ms. Liese faxed a Notice of Time Change to Nissan's office in New Jersey at 4:00 p.m. on March 13, 1996, the afternoon preceding the hearing specifying the new hearing time of 12:30 p.m. In accordance with standard practice, the fax notice was the only written notice sent. No notice was sent by mail, and such a notice sent by mail would not have provided timely information. The Notice was received by Nissan at 4:01 p.m. The secretary at Nissan who receives faxes has the responsibility of distributing them to the representatives handling the particular cases involved. No one at Nissan delivered the fax to William Fennelly, and he did not check the fax machine or receive the information on March 13th.

On the morning of March 14th between 8:00 a.m. and 9:00 a.m., Ms Liese telephoned Nissan and spoke to Mr. Fennelly. She confirmed with him the correct date and time of the hearing. Mr. Fennelly testified that she only corrected the hearing date, and nothing was said about the time. Ms. Liese testified that she confirmed both the correct date and the new hearing time, and that she believed that Mr. Fennelly may have been talking at the same time she was and had not listened carefully or had not appreciated the fact that there had been a time change, but that she had provided that information. The court finds the testimony of Ms. Liese credible, and finds the facts as she stated them. In addition, Ms. Liese had already faxed the Notice of Time Change, and knew it had been received at Nissan.

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Nissan intended to appear at the hearing to contest the Appellee's claims before the Board, and Mr. Ferreira was en route to do so with the expectation that the hearing would be at 3:00 p.m. At no time before 3:00 p.m. did Mr. Fennelly, who was still in New Jersey, see the Notice of Time Change that had been faxed to his office and discover that the hearing was going to be at 12:30. Therefore, he made no attempt to notify Mr. Ferreira of the change. He testified that if he had known of the 12:30 hearing time on March 13th or March 14th in the morning, he could have notified Mr. Ferreira or Nissan's attorney of the time change.

The Board convened the hearing at 12:30 p.m. The Board waited in case the Nissan representative might be late. Ms. Liese checked for telephone messages at the hearing site and at her office to see if there was any message from anyone from Nissan, and there was not. She did not attempt to telephone Mr. Fennelly or any other person at Nissan to learn the reason for Nissan's unanticipated absence from the hearing. The Board proceeded with the hearing at approximately 12:45 p.m. and took evidence from Appellees. No Nissan representative was in attendance. At no time prior to the hearing did the Board ever receive any information that an attorney would be involved in the case on Nissan's behalf, so the Board never notified Nissan's attorney of either the original hearing date and time or the rescheduled time.

The Board rendered a decision against Nissan on the basis of the evidence presented at the hearing. At no time did the Board ever hear evidence or argument from Nissan.

Carlos Ferreira appeared at the hearing site some time before 3:00 p.m., after which he contacted Ms. Liese at the Board office and was informed by Ms Liese that the Board had already conducted the hearing and rendered its decision. He telephoned Mr. Fennelly to inform him. Mr. Fennelly then telephoned Pauline Liese. At this time, Mr. Fennelly had still not seen the Notice of Time Change which had been faxed to his office the day before. Subsequently, through counsel, Nissan sought an opportunity to be heard, which was denied by the Board.

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CONCLUSIONS OF LAW

This matter is before the court on an appeal in accordance with V.R.C.P. Rule 74 from a decision of the New Motor Vehicle Arbitration Board pursuant to 9 V.S.A. §4176. The statute is specific about the limited nature of judicial review, and sets forth four narrowly-defined bases that must be proved before the Court may vacate or modify a decision of the Board. It also requires that an appellant show entitlement to relief by clear and convincing evidence.

The statute provides as follows:

> § 4176. Appeal from board
>
> (a) The decision of the board shall be final and shall not be modified or vacated unless, on appeal to the superior court a party to the arbitration proceeding proves, by clear and convincing evidence, that:
>
> (1) the award was procured by corruption, fraud or other undue means;
>
> (2) there was evident partiality by the board or corruption or midconduct prejudicing the rights of any party by the board;
>
> (3) the board exceeded its powers;
>
> (4) the board refused to postpone a hearing after being shown sufficient cause to do so or refused to hear evidence material to the controversy or otherwise conducted the hearing contrary to the rules promulgated by by the board so as to prejudice substantially the rights of a party.

Appellant claims it is entitled to an order reversing the decision of the Board based on inadequate notice to Nissan, failure to follow Board Rules, and refusal to hear material evidence from Nissan, all of which show substantial prejudice to Nissan.

Appellant has not shown by clear and convincing evidence that the Board failed to provide adequate notice to Nissan of the accelerated hearing time. On the contrary, the Board provided reasonable advance notice in two ways. First, it faxed a notice of Time Change during regular office hours the afternoon of March 13th. The fact that Mr. Fennelly himself did not receive the notice at any time either that afternoon or the next day is not a failure on the part of the Board, but a failure on the part of Nissan's office operations personnel to transmit the information to him. The evidence shows receipt of the Notice by Nissan at 4:01 p.m. on March 13th. Nissan is in the business of

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attending such hearings, and had received two previous notices that clearly stated that hearing times are frequently changed. The hearing in this matter was scheduled for late in the day, so it is reasonable to anticipate that the time of the hearing might be advanced if hearings are not needed for other cases. The fax Notice to Nissan was timely, and in accordance with regular and predictable practice.

The second form of notice to Nissan was the information Ms. Liese personally gave to Mr. Fennelly over the telephone on the morning of the 14th. This was in plenty of time for Nissan to seek a continuance or a change in the hearing time, or notify its attorney, or direct Mr. Ferreira to arrive at the earlier time. The fact that Nissan did not properly handle information that was reasonably transmitted to it for the purpose of giving it notice does not mean that the Board failed to provide it with adequate notice. The evidence is not clear and convincing that the notice provided by the Board was improper or inadequate, or that there was any misconduct on the part of the Board prejudicing the rights of Nissan.

Appellant also claims that the notice provided to Nissan was contrary to its own rules, because it was not provided notice by mail as required by Rule 8. While it is true that the rule states that notice shall be given by mail, the purpose of the rule was fulfilled in this case in a manner more meaningful than if the rule had been observed fully in technical detail. Experience had shown that fax notices provided more reliable and timely notice to manufacturers, including Nissan, than mail notice. Nissan had participated in this protocol in the past without complaint. The Notice of Hearing gave clear advance warning that hearing times were subject to change, and the context showed that a notice of change in time by fax would provide better communication, consistent with standard practice, than mail notice. Mail notice would not have reached Nissan in time. While the Board did not provide mail notice of either the original Notice of Hearing or the Notice of Time Change, there was no complaint about the original fax notice, and in fact Appellant sought to adhere to the 3:00 p.m. hearing time provided by fax notice. In addition to providing fax notice, the Board provided in-person telephone notice. Strict compliance with the literal terms of Rule 8 would have defeated the

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purpose of advance communication, and this purpose was fully met by the steps undertaken by Ms Liese. The evidence is not clear and convincing that the failure to follow the literal terms of Rule 8 provided insufficient notice to Nissan so as to substantially prejudicing its right to a hearing. The lack of observance of rules is not automatically a basis for vacating an award unless such lack of observance has the effect of substantially prejudicing a party's rights.

Appellant argues that advancement of the hearing time substantially prejudiced its right to an opportunity to be heard with notice. The facts show that Nissan knew, both from its past experience with Board hearings and from the clear terms of the Notice of Hearing it received two weeks in advance, that the 3:00 p.m. hearing time might be advanced depending on the status of other cases scheduled for that day. Nissan actually was provided with an opportunity to be heard, and was given advance notice of the possibility of an advancement in the time, and advance actual notice of the advancement in the time by two meaningful methods. Nissan lost its chance to take advantage of that opportunity due to its own handling of the notice information, and not because the Board acted in a manner to deprive it of its hearing opportunity. The evidence is not clear and convincing that the accelerated hearing time constituted misconduct on the part of the Board that substantially prejudiced the rights of Nissan.

Finally, Appellant argues that the Board refused to hear material evidence from Nissan to its substantial prejudice. The evidence shows that the Board declined to offer Nissan a second opportunity to be heard after it missed its original opportunity to be heard due to its own failure to act on the notice information it received. The court is not clearly convinced that the Board has an obligation to compel Board members and staff and Appellees to wait several extra hours or attend two hearings to accommodate a manufacturer who neglects to attend to information about a scheduled hearing provided in a timely and reasonable manner. While the Board could have decided to telephone Nissan at 12:30 when no Nissan representative appeared, and while the Board could have decided to vacate its award and convene a second hearing once it learned that Nissan's representative appeared at 3:00, the question before the Court is not what the Court believes the Board should do

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under those circumstances, but whether the Appellant has shown by clear and convincing evidence that the Board's decision not to do one of those things amounted to misconduct substantially prejudicing Nissan's rights.

For the foregoing reasons, the Appellant has not met the burden of showing entitlement to relief under 9 V.S.A. §4176, and the award of the Board is confirmed pursuant to 9 V.S.A. §4176(a)(4). Under such circumstances, Appellees are entitled to attorney's fees in obtaining the confirmation of the award together with costs. 9 V.S.A. §4176(a)(4).

ORDER

The appeal is denied, and the award of the New Motor Vehicle Arbitration Board is confirmed. Appellees shall submit an affidavit of costs and attorneys' fees within ten (10) days. If no objection is filed within five (5) days of the filing of the affidavit, the court will issue an order concerning attorney's fees and costs. The Stay of the award is hereby lifted.

Dated at Woodstock, Vermont this 25th day of August, 1997.

Mary Miles Teachout

Hon. Mary Miles Teachout,
Presiding Superior Court Judge

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