

## **Failure to Comply With Discovery May Cost More Than Just Sanctions**

by

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As evidenced by the recent case *Nader Auto. Group, LLC v. New Motor Vehicle Bd.* (2009) 178 Cal.App.4th 1478, failure to comply with discovery may cost you more than just sanctions – it could cost you the whole case.

In *Nader*, the New Motor Vehicle Board (“Board”) dismissed the protest filed by Nader Automotive Group, LLC and its general manager, Nader Eghtesad, (collectively “Nader”) after Nader was terminated as a franchised dealer by Volkswagen of America, Inc., and Audi of America, Inc. The basis for the Board’s dismissal was Nader’s failure to comply with authorized discovery under Vehicle Code section 3050.2(b) which provides in relevant part as follows: “The executive director [of the Board] may, at the direction of the Board, upon a showing of failure to comply with authorized discovery without substantial justification for that failure, dismiss the protest or petition or suspend the proceedings pending compliance.”

The dismissal by the Board in this case occurred as a result of Nader’s repeated failure to comply with its discovery obligations. At the prehearing conference that took place in May, the parties stipulated to a discovery schedule with August 9 as the final date for document production. However, by August 9, Nader had failed to produce any documents related to either franchise. Further, Nader did not communicate to Audi, Volkswagen, or the Board that the documents were going to be late and made no attempt at a partial production.

Accordingly, on August 23, Audi and Volkswagen filed motions to dismiss the protests based on Nader’s failure to comply with its discovery obligations under the Vehicle Code. Nader immediately opposed these motions, claiming excuses of “limited staff” and “difficulty assembling the documents” in defense of its inaction and promised the documents would be produced by August 31. However, the documents were not produced until September 5, and the production included only a few relevant documents scattered randomly among illegible checks, documents in a foreign language, and documents related to franchises other than Audi or Volkswagen.

After reviewing the documents and hearing oral arguments from both sides, the administrative law judge (ALJ) recommended that the Board grant the motions to dismiss the protests. Among other things, the ALJ found Nader had failed to comply with its discovery obligations without substantial justification, the documents Nader finally produced were late and inadequate, and its failure was “deliberate or at best grossly negligent.” The Board’s executive director adopted the ALJ’s findings and ultimately the Board dismissed Nader’s protest.

Nader filed petitions for writs of administrative mandamus in the trial court seeking to set aside the dismissals. After briefing and oral argument by the parties, the court denied the petitions. Nader filed a timely notice of appeal from the denials.

On appeal, Nader asserted two main contentions: (1) section 3050.2(b) is unconstitutional on its face and as applied; and (2) the board's findings that Nader failed to comply with authorized discovery without substantial justification were not supported by sufficient evidence.

In particular, Nader contended that section 3050.2(b) is unconstitutional on its face because it “has no standards for an [ALJ], the director or the Board to apply in deciding the motion to dismiss.” The appellate court found Nader’s argument to be unsupported and at odds with the plain language of the statute which provides that the standard requires a showing of failure to comply with authorized discovery without “substantial justification” for the executive director to dismiss the protest. The “substantial justification” language is the same language used in the discovery sanctions provision of the Code of Civil Procedure, which mandates sanctions in a variety of situations unless the party subject to sanctions acted with “substantial justification.” (Code Civ. Proc., § 2031.310, subd. (d).) The phrase “substantial justification” is generally interpreted to mean that the party's position in the proceedings was clearly reasonable, i.e., it had a reasonable basis in law and fact. ( *Tetra Pak, Inc. v. State Bd. of Equalization* (1991) 234 Cal.App.3d 1751, 1763-1764.) Thus, based on the plain language of the statute Nader failed to demonstrate section 3050.2(b) was facially unconstitutional.

Nader's argument the statute is unconstitutional as applied was likewise rejected by the court. Nader argued that the timeline for discovery was “outrageous”; it was not given adequate opportunities to be heard; Audi and Volkswagen improperly used “the procedural mechanism of a motion to dismiss” because “there are no provisions ... authorizing a motion to dismiss”; the board acted in excess of its jurisdiction in granting the motion to dismiss; and the board was required to consider a lesser sanction than dismissal.

The appeals court likewise found that each of these arguments lacked merit. First, the timelines for discovery were not outrageous. The prehearing conference in May at which the discovery schedule was set took place after three continuances Nader had requested. When the discovery schedule was set, it was by stipulation of all parties, including Nader. When the August 9 deadline for production of documents came and went, Nader did not communicate to Audi, Volkswagen, or the board when the documents would be produced and did not attempt a partial production. Second, Nader was given many chances to be heard on both Audi's and Volkswagen's motions to dismiss. Not only were there four days of hearings on the motions to dismiss, but at the hearings, Nader was given continuances to allow it extra time to produce the documents and chances to orally argue its position. Third, Nader's arguments that a car manufacturer does not have the authority to file a motion to dismiss the protest and that the Board does not have the authority to grant such motion to dismiss are both contrary to established case law. Finally, statutory and case law defeat Nader's argument that the Board was required to consider a lesser sanction than dismissal. The statute clearly states that the Legislature has vested in the executive director (at the direction of the Board) power to “dismiss the protest” upon a showing of failure to comply with authorized discovery without substantial justification. (§ 3050.2(b).) The statutory scheme does not require the board to consider a lesser sanction first.

The court also found no merit to Nader’s contention that there was insufficient evidence to support the Board's findings. As the court pointed out, Nader had agreed to a discovery

schedule and stipulated that there were no disputes as to the requests for production of documents, yet, nonetheless failed to meet such deadline or communicate with the other parties regarding same. Furthermore, by the time Audi and Volkswagen filed their motions to dismiss on August 23, it had been four and one-half months since the protests were filed, two and one-half months after Audi and Volkswagen served their discovery requests, and a month and one-half after all parties agreed there were no discovery disputes. In addition, when Nader finally produced some documents on September 5, they were, as the ALJ described, “woefully inadequate” and the excuses for nonproduction and deficient production were difficult to reconcile with the small quantity of documents produced and the two months Nader had to produce those documents.

Thus, the sorry excuses of Nader proved to be too little too late, and it goes to show that sometimes a case can be won and lost in discovery.