STATE OF VERMONT
WASHINGTON COUNTY, SS.

ROBERT SCHAFFER	)	**WASHINGTON SUPERIOR COURT**
	)	**Docket No. 732-11-02 Wncv**
v.	)	
	)	
KIA MOTORS	)	

Opinion and Order

This is an appeal from a decision of the Vermont New Motor Vehicle Arbitration Board. Mr. Schaffer made a claim to the Board that the four wheel drive on his Kia vehicle was not working properly. A hearing before the Board was conducted on July 25, 2002. The Board made a written Decision dated August 6, 2002, following which Mr. Schaffer filed a Motion for Reconsideration, Motion for New Evidence, and Request for Reversal. The Board denied these Motions on September 5, 2002.

Mr. Schaffer thereafter filed this appeal pursuant to 9 V.S.A. §4176. Mr. Schaffer appeals both the Decision of the Board dated August 6, 2002, and the Denial of the Motions dated September 5, 2002. Oral argument on the appeal was heard on June 23, 2003. Appellant Robert Schaffer is represented by Lauren S. Kolitch, Esq. Kia Motors is represented by Douglas LeBrun, Esq. Both parties filed memoranda of law. After the oral argument, the court listened to the tape record of the hearing before the Board on July 25, 2002.

Under 9 V.S.A. § 4176 (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 misconduct 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 the board so as to prejudice substantially the rights of a party.

(Emphasis added.)

Appellant seeks an opportunity to present evidence. The court requested that the Appellant make specific offers of proof to support his request for an evidentiary hearing. After having heard the offers of proof, reviewed the entire record, and listened to the tape of the hearing before the board, the court concludes that Appellant has not made offers of proof sufficient to support any claim under any of the statutory factors set forth above, even by a preponderance of the evidence. Clear and convincing is the standard of proof required.

Undue means

Appellant offers to prove that the award was procured by "undue means" on the grounds that the Kia representative at the hearing was personally involved in handling Appellant's car. It is to be expected that a manufacturer would send to the hearing a person with knowledge about the car and repair problem that is the subject matter of a hearing before the Board. That fact does not show a prima facie case of undue means, even if the Kia representative is a frequent participant at Board hearings.

Evident partiality

Appellant's attorney concedes that the tape recording of the hearing does not show that the Board was partial toward the manufacturer. Appellant seeks an evidentiary hearing to show that before and after the hearing, it was clear that the Kia representative was well known to the Board members, and that he engaged in jocularity and informal discussion with them as if they were "best buddies," such that the Kia representative's testimony at the hearing must have been treated differently than Appellant's testimony. Obviously there is no record of conduct before and after the hearing. However, if the record of the hearing shows that the Board's decision was sound and based on all the information presented at the hearing, and that a reasonable person reviewing the record would have reached the same result, the Appellant cannot show that the decision of the Board was based on evident partiality.

There is absolutely nothing in the record to show that the decision of the Board was based on partiality, as it is consistent with the outcome that might be expected from a Board even if the Kia representative was entirely unknown to any of the Board members. The evidence before the Board was that the car had been repaired 4 times for problems with the four wheel drive. On the fourth and final time, the car was in the possession of Kia from May 17, 2002 to one day before the hearing, July 24, 2002, but Kia had notified Appellant that it had been repaired by the installation of a new kit in May and Appellant was notified on May 31, 2002 that it was ready to be picked up. Appellant did not pick it up until the day before the hearing. He did not try the four wheel drive between the time he picked it up and the hearing, so he was not able to say whether it was repaired or not. The Kia representative testified that it had been difficult to figure out the problem, but that the problem had been located and a new kit had been installed in a manner that would repair the problem, and that the four wheel drive was operating properly. The Board chair asked both parties in a polite and unhurried manner if there was a request for the Board to test drive the car, and Appellant did not make any request for the Board to test drive the car. The Board concluded that the vehicle was repaired. The Appellant has not shown grounds for being able to prove evident partiality to any extent, and not by clear and convincing evidence.

Exceeding powers

Appellant claims that the Board exceeded its powers by not driving the car, which Appellant had brought to the hearing, and which was available to be driven. As noted above, Appellant was asked if he wished to have the Board test drive the car, and he made no such request. It was not outside the authority of the Board to fail to drive the car when there is no request to do so, as there is no requirement by statute or rule to do so.

Appellant also claims that it was outside the Board's powers to deny his request to reopen the hearing when he telephoned after the hearing to notify the Board that there were problems with the car. There is neither a factual or legal basis for concluding that such a denial would be beyond the Board's powers, even to a preponderance of the evidence when the evidence is viewed in the light most favorable to the Appellant. The Board had held an unhurried hearing with full opportunity for the Appellant to present evidence concerning the condition of the car. At the hearing, the Appellant acknowledged that he had not attempted to pick up the car between May 31, 2002 and July 24, 2002, and that since he had picked it up, and before the hearing, he had not tested the four wheel drive. He did not accept the Board's offer to test drive the car. Under those circumstances, the Board was not required to reopen the hearing when Appellant called after the hearing with a new complaint.

Similarly, it was not beyond the Board's powers to decline to grant the Motions for Reconsideration, New Evidence, and Request for Reversal, when the grounds presented by Appellant was a letter from Greensboro Garage in which the person who stated there was a problem with the car acknowledged driving it only in two wheel drive. The problem that was the subject matter of the hearing before the Board was the four wheel drive.

Conducting the hearing contrary to the Rules

Appellant alleges that the Board's failure to reopen the hearing, and refusal to hear new evidence after the hearing had been concluded, constituted failure to conduct the hearing according to the rules, and that such failure substantially prejudiced Appellant's rights. This is an allegation without factual support. The grounds advanced by Appellant in support of his requests did not support the relief he asked for in the motions, and he has not cited to any rules that were not observed by the Board. He has not shown in any way how his rights were prejudiced.

In sum, the court declines to schedule an evidentiary hearing, as the Appellant has not shown any basis upon which it would be able to prove, by clear and convincing evidence, that any of the criteria would support modification or vacation of the Decision of the Board.

For the foregoing reasons, the appeal is *denied*.

Dated at Montpelier, Vermont this 29th day of August, 2003.

Mary Miles Teachout
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Superior Judge