concerns and had a more direct impact on competition over hours and working conditions than on business competition.

6. The nonstatutory labor exemption to the antitrust laws applies to the concerted activity of respondents setting uniform operating hours for the sale of cars in the Detroit area.[37]

The complaint, therefore, must be dismissed.

OPINION OF THE COMMISSION

BY OLIVER, *Chairman*:

The question presented in this case is whether an agreement among new car dealers in the Detroit metropolitan area to close dealer showrooms on Saturdays and on three weekday evenings is an unlawful restraint of trade. The respondents are the Detroit Auto Dealers Association, Inc. ("DADA"), its executive vice president, several line associations (groups of dealers selling the same make of car), numerous dealerships, and numerous individual owners and operators of dealerships.

The complaint, issued on December 20, 1984, charges that the respondents' agreement to keep showrooms closed all day Saturday and on Tuesday, Wednesday, and Friday evenings is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.[1] Administrative hearings in 1986 produced over 5,000 pages of testimony and almost 4,000 exhibits. On July 14, 1987, Administrative Law Judge James P. Timony issued his initial decision. He dismissed the complaint, finding that the hours restriction was immune from antitrust scrutiny by virtue of the nonstatutory labor exemption to the antitrust laws. The ALJ also found that the agreement had only a remote and insignificant effect on competition. Complaint counsel appeal, contending that the ALJ stretched the nonstatutory labor exemption beyond its accepted limits

[37] Other issues are raised in the briefs of the parties. The Administrative Procedure Act provides that initial decisions shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record. 5 U.S.C. 557(c)(3). The agency, however, is only required to make findings of fact on those points relevant to settling the controversy before it. *Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960); *Community & Johnson Corp. v. United States*, 156 F. Supp. 440, 443 (D.N.J. 1957).

[1] Paragraph 5 of the complaint, which charged that respondents enforced the showroom hours agreement through acts of violence and intimidation, was dismissed without opposition at the close of complaint counsel's case-in-chief for lack of evidence linking such acts to the respondents. Count II, which charged that respondents agreed to restrict the advertising of new cars, was settled by consent agreement with some respondents and dismissed as to other respondents. Those parts of the complaint are not involved in this appeal.

and that he erred in finding no effect on competition. We agree with complaint counsel and reverse the ALJ. **[2]**

I. The Facts

A. *The Respondents*

The Detroit Auto Dealers Association, Inc. ("DADA") is a membership organization whose function is to promote the business interests of new car dealerships. IDF 5.[2] All of the dealerships named as respondents in this proceeding, as well as almost all other Detroit-area domestic and import dealers, are members of DADA. IDF 1, 4. The respondent dealerships are also members of their respective line associations. The line groups, like DADA, promote the business interests of their members (*e.g.*, through cooperative advertising programs), but their efforts are limited to a particular make of car.

DADA is managed by a board of directors consisting of one representative from each line group having at least seven DADA members. IDF 6. An executive vice president implements the policies of the board. IDF 8.

B. *History of Dealer Closings*

The development of the restriction on evening and Saturday showroom hours is well documented in the minutes of meetings of DADA and the line associations, as well as in ads that were placed in local newspapers to announce changes in hours. The ALJ reviewed this evidence in great detail and we need only summarize it here.[3]

Until 1959, new car dealerships in the Detroit metro area were open for business on Saturday and every weekday evening. IDF 9. The movement to limit hours of operation began in June of that year when DADA's board of directors, saying that it had devoted "considerable time and thought to the subject of evening closings," announced that it was recommending closing on Wednesday and Saturday evenings effective July 1, 1959. RX 2A. DADA sent a letter to that effect to

[2] References to the record are abbreviated as follows:

ID — Initial Decision
IDF — Initial Decision Finding
IDC — Initial Decision Conclusion
CX — Complaint Counsel's Exhibit
RX — Respondents' Exhibit
CAB — Complaint Counsel's Appeal Brief
RAB — Respondents' Answering Brief
CRB — Complaint Counsel's Reply Brief

[3] We adopt the ALJ's findings of fact to the extent that they are not inconsistent with this opinion.

each member and, in July and **[3]** August, placed ads in the *Detroit News* and *Detroit Free Press* to alert the public that dealers were now closing at 6:00 p.m. on Wednesdays and Saturdays. IDF 11, 12. By the middle of August, over 70% of the dealers surveyed by DADA were closing on those two evenings, including all of the dealers for four makes of cars and all but one dealer for five other makes. IDF 13. The following year, dealers for three more makes voted at line association meetings to join in the Wednesday and Saturday evening closings. IDF 14–16. The hours limitation had achieved widespread success by the end of 1960. IDF 18.

In October 1960, DADA wrote its members that the Wednesday and Saturday evening closings had "proven to be very worthwhile" and asked whether members were in favor of closing on Friday evenings as well. CX 112. After receiving a favorable response, DADA directors met with line group presidents and dealers at DADA headquarters on February 23, 1961. The next day, DADA announced that the participants had agreed to recommend closing on Friday evenings beginning March 3, 1961. IDF 22. Lincoln-Mercury dealers, who had already begun closing Friday evenings, were quickly joined by Plymouth, Dodge, Oldsmobile, Buick, and Chevrolet dealers. CX 121A, CX 405. Later in 1961, Ford dealers announced that they would add Fridays to their Wednesday and Saturday night closings. IDF 25. To assist in this change, DADA provided each of its members with a sign stating: "This dealership closes at 6:00 p.m. on Wednesdays, Fridays, and Saturdays." IDF 22.

For the next few years, respondents concentrated on preserving the status quo. At a meeting on November 13, 1962, DADA's board discussed fifteen Ford dealers who were staying open late on Fridays and concluded that the directors themselves should "contact the offending . . . dealers and try to persuade them to resume their closing on Friday evenings." IDF 27. In April 1964, in response to a dealer's assertion that fifty percent of local dealers were open on Friday evening, the board held "a lengthy discussion of the ways and means by which DADA could police the evening closing program" and agreed that a survey should be taken. CX 153A. Contrary to the dealer's assertion, the survey showed 88% of DADA members in compliance with the evening closing program. IDF 29. Nevertheless, efforts to bring the remaining members into compliance continued, including a plan to circumvent uncooperative dealers by advertising the DADA-approved hours directly to the public. DADA's executive vice president sent a memo to several board members on April 21, 1965, saying:

We are continuing our efforts to get all DADA members to close their dealerships at 6:00 p.m. on Wednesdays, Fridays, and Saturdays. **[4]**

To that end we are attempting to determine which dealers are remaining open. After we learn this, we plan to write to each one soliciting his cooperation. If that fails, we will place advertisements in the suburban newspapers which cover the areas in which the uncooperative dealers are located, stating that new car dealers in Wayne, Oakland, and Macomb counties close at 6:00 p.m. on Wednesdays, Fridays, and Saturdays.

IDF 31. This plan was carried out over the summer of 1965. IDF 32–33. In fact, in July, DADA announced to the public that it had "established" 6:00 p.m. as the closing hour on Wednesday, Friday, and Saturday evenings for "all new car dealerships." CX 3300.

In 1966, respondents extended the evening closing program to Tuesdays. A September 27, 1966 letter by DADA's executive vice president described the development of the hours restrictions up to that point:

By way of background, we first discussed [evening closings] in a Directors' Meeting in April, 1959. We continued to discuss it, and finally, in June of that same year, adopted the policy of closing at 6:00 p.m. on Wednesday and Saturday evenings. . . .

The closing program continued with varying degrees of success until March, 1961, when it was decided to close Friday evenings, as well as Wednesday and Saturday evenings.

We remained on Wednesday, Friday and Saturday evening basis [sic] until July of this year when the subject of closing on Tuesday evenings began to be discussed. Four line groups (Cadillac, Chevrolet, Lincoln-Mercury and Rambler) agreed to close that evening on a line-group basis. The majority of our imported car members also agreed to close on that evening and some Buick and Oldsmobile members started closing but on an individual basis.

We feel that this Tuesday closing will gain momentum and that it is just a question of time until the great majority of our dealers will close on that evening.

CX 172A. Shortly thereafter, the Chevrolet line group received a report that DADA was encouraging dealers to close on Tuesday evenings. CX 310A. The following February, DADA's board of directors resolved to recommend that all members not already **[5]** closed on Tuesday evening begin closing on that evening, effective immediately. CX 84A-B.

The final stage of the respondents' hours reductions, and the one that took the longest to accomplish, was the closing of showrooms during the day on Saturday. At first, dealers considered shortening or limiting Saturday hours only during the summer months. These discussions bore fruit in 1969, when Dodge, Chrysler-Plymouth,

Pontiac, Buick, Oldsmobile, and Lincoln-Mercury dealers decided to close on Saturday for the summer. IDF 40–41. They were joined the following year by Ford and Chevrolet dealers, who agreed to close Saturdays in July and August. IDF 42, 43. It was three more years before dealers moved to close Saturday year-round. By the end of November 1973, the Dodge, Chevrolet, Buick, Oldsmobile, Ford, Lincoln-Mercury, and Chrysler-Plymouth dealers all had agreed to close Saturdays beginning December 1, 1973. IDF 48–50.

In short, over the course of fourteen years, metro Detroit new car dealers, acting through their line associations and DADA, reached agreements that cumulatively resulted in the closing of dealer showrooms on Tuesday, Wednesday, and Friday evenings and all day Saturday. Since about December 1, 1973, the vast majority of Detroit area dealerships have been closed at those times. Detroit is now the only metropolitan area in the United States in which almost all new car dealerships are closed on Saturdays. IDF 53. Only eight out of 231 dealerships have regular Saturday hours year-round, and only seven remain open after 6:30 p.m. for three or more nights per week. IDF 51–52.

C. *History of Labor Activity*

Respondents do not dispute the fact of these joint hours reductions. They contend, however, that the agreements to reduce hours were made in response to periodic efforts by labor unions to organize sales employees at metro Detroit new car dealerships. Respondents introduced extensive testimony and exhibits on the unionization efforts. As with the history of dealer closings, we need only summarize the ALJ's review of that evidence here.

Labor unions first turned their attention to Detroit-area automobile dealerships in the 1940s. IDF 76. The Teamsters union concentrated on the "front end" of the dealerships (the sales departments), while the United Auto Workers sought to organize the "back end" (the service departments). IDF 78. The Teamsters managed to organize several Ford and Lincoln-Mercury dealers before World War II, but ultimately no contract came of it. IDF 76–77. The UAW also organized a few dealerships and in 1947 instigated a lengthy, violent strike of service shop employees in order to pressure dealers into multi-employer **[6]** bargaining. IDF 80–81, 85–87. Although the UAW strike involved service employees, it apparently left dealers apprehensive about the prospect of further union disputes. IDF 88.

No further attempts were made to organize sales employees until 1954. Most metro Detroit dealerships at that time were open from 9:00 a.m. to 9:00 p.m. Monday through Friday, and from 9:00 a.m. to 6:00 p.m. on Saturday, a total of 69 hours per week. IDF 92. Some dealers required sales employees to work all hours the dealership was open. IDF 96. Other dealers used split shifts or other systems to limit individual employees' work hours, but employees at those dealerships nevertheless felt pressure to be present during all showroom hours. That pressure arose from their fear of losing customers, and therefore commissions, to fellow salesmen.[4] IDF 101, 120–121.

Early in 1954, the Teamsters launched a campaign that eventually attracted some 2,700 sales employees. IDF 105–106. One of the union's primary recruiting tools was a demand for a shorter work week. IDF 107. To sales employees, a shorter work week meant fewer showroom hours, because they viewed the latter as essentially controlling the former. IDF 102. Moreover, to them, it also meant *uniform* showroom hours, because salesmen feared skating between dealerships if some dealers remained open longer than others. IDF 103–104.

A uniform shorter work week, however, was not the Teamsters' only demand. Another key demand was multi-employer bargaining. IDF 109. Multi-employer bargaining is a process in which independent employers negotiate as a unit with a union representing employees of each of the employers. As noted by the ALJ, multi-employer bargaining can be an effective way for unions to achieve uniformity of wages, hours, and working conditions. IDF 71. A multi-employer labor pact can make it easier to organize workers or to implement an industry-wide strike, and therefore increases a union's bargaining power. IDF 71–72. For these reasons, unions attempting to organize Detroit-area dealerships consistently sought multi-employer bargaining. IDF 75.

The parties agree that the respondents in this case wanted to avoid unionization. Accordingly, the dealers' labor counsel advised them to resist multi-employer bargaining, which might have given the Teamsters additional leverage. IDF 89. Counsel **[7]** further advised that the best way to avoid multi-employer bargaining was for the dealers to present a united front to the union and to make uniform

[4] The phenomenon of losing a customer to another salesman is known in industry jargon as "skating." Skating occurs when, for instance, a customer negotiates with one salesman, returns to the dealership when that salesman is not in the showroom, and closes the deal with a different salesman, who then claims the commission due on the sale. IDF 100.

concessions to sales employees. *Id.* At trial, labor counsel testified that they advised dealers that concessions to labor could provoke unionization if the concessions were not uniform. IDF 91.

The Teamsters union struck several dealerships in late 1954, pressing its demands for multi-employer bargaining, higher commissions, and a uniform shorter work week. IDF 107–09, 112. The union withdrew many of its election petitions, however, after the National Labor Relations Board refused jurisdiction over the dealers. The union was defeated in most of the remaining elections, and the organizational drive essentially collapsed. IDF 113.

The next major Teamsters campaign began in 1959 and continued into 1960, when a new, competing union, the Salesmen's Guild of America, also entered the picture. IDF 124, 128. Both unions made demands similar to those presented in 1954: multi-employer bargaining, uniform five-day work weeks, higher commissions, and other benefits. IDF 126, 128–130. Dealers discussed these demands at line group meetings. IDF 136. In September 1960, the line groups recommended that dealers adopt "minimum employment standards" covering such things as paid vacations, minimum commissions, demonstrator programs, shorter work weeks, and group insurance. These minimum standards were designed to match most of the union demands. *Id.;* RX 807C, 809. The dealers hoped to head off the unions by making these concessions, and the strategy was successful; by December 1960, both the Guild and the Teamsters had lost almost all of their representation elections. IDF 144–145.

By the mid–1960s, most dealerships were closed on Wednesday, Friday, and Saturday evening, but sales employees continued to complain about the length of the work week. IDF 151. A new union, the Automotive Salesmen Association, started recruiting in early 1966, with evening and Saturday closings as a primary objective. IDF 152–153. Like the Teamsters and the Guild before it, the ASA also demanded that the dealers form a city-wide multi-employer bargaining unit. IDF 157. The ASA called a brief strike at the beginning of March 1967. According to a contemporary report in the *Automotive News,* the motivation for the strike was the dealers' refusal to engage in multi-employer bargaining. RX 821C-D.

There were also a number of strikes during negotiations with individual dealerships in 1967 and 1968. IDF 190. Some of these were lengthy, and many of them involved violence, threats of violence, and vandalism. IDF 186. According to the president of the ASA, most of

the strike issues were "bread and butter" issues, including not only hours but also earnings, benefits, job **[8]** security, and working conditions. RX 728C. Since most dealerships were by then closed four nights a week, the question of shorter hours focused on Saturdays. IDF 193.

The ASA eventually won elections at about 100 dealerships, but managed to sign and ratify contracts at only 29 of them. RX 843. Although the union attempted to negotiate an end to Saturday work at organized dealerships, it was not successful. IDF 167–169. In fact, most of the contracts expressly reserved to management the right to determine the business hours of the dealership. CX 3604B, 3605F, 3607F, 3608F, 3609G, 3610R, 3612R, 3613S-T, 3614B, 3615M. Nevertheless, salesmen continued to complain about working Saturdays. IDF 195, 199. In June 1969, the ASA sponsored a rally and a demonstration in front of DADA headquarters to demand an end to Saturday work. IDF 177. The following year, salesmen petitioned DADA to urge dealers to close on Saturdays. IDF 219. DADA refused, since taking any such action in response to an employee request might inadvertently have led to a requirement that the dealers engage in multi-employer bargaining. *Id.*

In 1971 the ASA affiliated with the Teamsters union. IDF 205. The Teamsters continued ASA's organizational efforts, making Saturday closings its principal recruiting tool. IDF 206. In the next couple of years the Teamsters struck several individual dealerships and picketed non-union dealerships on Saturdays, demanding a uniform five-day work week. IDF 211–218, 220–224, 239. Threats, physical assaults, and property damage were common. IDF 210, 212–217, 221, 226–227. Some dealers attempted to satisfy their sales personnel by splitting shifts or offering to close on a day other than Saturday, but they were apparently unable to resolve the salesmen's complaints. IDF 235–237.

The Teamsters tried to achieve Saturday closings at organized dealerships through formal collective bargaining, but without much success. Some dealers did agree to a "maintenance of standards" provision, which required the employer to continue the wages, hours, and working conditions in effect at the time the agreement was signed. IDF 229–231. These provisions effectively prohibited some individual dealers from extending their hours of operation. IDF 230, 288. The maintenance of standards provisions, however, apparently did not have the effect of requiring dealers to close on Saturday unless they were already doing so when the contract was signed.

Detroit-area dealers discussed the Teamsters' demands at their respective line group meetings. IDF 232. Ultimately, the dealers concluded that the only way both to avoid unionization and to achieve labor peace was to give in to the demand for uniform, year-round Saturday closings. IDF 238. The agreement to close was an effort to undercut the desire of salesmen to **[9]** unionize to achieve their goals. IDF 241. The agreement effectively brought a halt to the organizational activities of the early 1970s. IDF 277. Though the Teamsters have attempted to organize dealerships since then, there apparently have not been any campaigns of the intensity seen before 1974. IDF 278.

Most Detroit-area dealers have experienced relative labor peace ever since they agreed to year-round Saturday closings in December 1973. IDF 242. Dealers who have tried to open on Saturdays or in the evening, however, have been subjected to picketing, threatening telephone calls, serious damage to their inventory, and vandalism of their lots and showrooms. IDF 245–276. Salesmen were among the picketers, *e.g.*, IDF 247, 248, 259, but the perpetrators of the threats and vandalism remain unidentified.[5]

II. Nonstatutory Labor Exemption

Respondents contend, and the ALJ found, that the various agreements to cut back dealer showroom hours directly responded to the demands of sales employees for uniform, shorter work hours. For example, DADA began discussing Wednesday and Saturday evening closings the same month the Teamsters' 1959 organizational campaign got underway. The movement to close Friday evenings started the month after line groups proposed "minimum employment standards" to head off unionization in 1960. Tuesday evening closings surfaced in DADA's discussions just two weeks after the ASA was formally incorporated in 1966. The agreement to close on Saturdays during the summer was reached after two years of violent strikes against dealerships, and the extension of Saturday closings to the rest of the year followed another round of strikes in 1971 and 1972.[6]

The ALJ ruled that the respondents' agreement to limit showroom hours falls within the "nonstatutory labor exemption" to the antitrust

[5] *See* n. 1, *supra.*

[6] The parties do not suggest that we treat the various agreements to reduce hours separately for purposes of antitrust analysis, and we see no reason to do so. Accordingly, in the remainder of this opinion we refer to respondents' "agreement" to limit showroom hours in the singular.

laws. The nonstatutory labor exemption is a judicially-created exemption that protects certain concerted activity from antitrust scrutiny. The ALJ based his ruling on his conclusions that the agreement "[grew] out of a labor dispute"; that it was "motivated primarily by labor concerns and had a more direct impact on competition over hours and working conditions than on business competition"; and that "any injury to competition or consumers . . . was outweighed by the benefits **[10]** of labor peace." IDC 2, 4, 5. Complaint counsel contend that the ALJ's decision stretches the nonstatutory labor exemption beyond its recognized limits. We agree.

The nonstatutory labor exemption "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 622 (1975). The nonstatutory exemption is an adjunct to the statutory exemption for labor activities found in Sections 6 and 20 of the Clayton Act, 15 U.S.C. 17 and 29 U.S.C. 52, and in the Norris-LaGuardia Act, 29 U.S.C. 101–115. Those statutes declare that labor organizations are not illegal combinations or conspiracies in restraint of trade under the antitrust laws and limit the power of courts to issue injunctions in cases involving or growing out of a labor dispute.

The statutory exemption for labor activity reflects Congress' desire to accommodate the antitrust laws to labor policy. The statutory exemption, however, is limited to legitimate organizing efforts and other collective activities undertaken by employees without participation by nonlabor parties. It does not apply to concerted action or agreements between labor and non-labor parties, such as a collective bargaining agreement between a union and an employer. *Connell,* 421 U.S. at 622; *United Mine Workers v. Pennington,* 381 U.S. 657, 662 (1965); *Mackey v. National Football League,* 543 F.2d 606, 611 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977).

The Supreme Court, though, has found that a proper accommodation of labor and antitrust policies requires some agreements between labor and non-labor parties to be free from antitrust sanctions. *Connell,* 421 U.S. at 622, *citing Local Union No. 189, Amalgamated Meat Cutters & Butchers Workmen of North America v. Jewel Tea Co.,* 381 U.S. 676 (1965). The court saw that the goals of federal labor law would never be achieved if standardization of wages, hours and working conditions—which ultimately will affect price competition among employers—were held to violate the antitrust laws. *Id.*

Accordingly, the court has recognized a "nonstatutory" exemption for labor-management agreements and certain other forms of conduct involving non-labor parties.

The central purpose of the nonstatutory labor exemption is readily apparent from the language the Supreme Court has used in describing the policy conflict to which the exemption responds. In *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers,* 325 U.S. 797 (1945), the court identified "two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency **[11]** of collective bargaining." *Id.* at 806. Similarly, in *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965), the court stated that its concern was to "harmoniz[e] the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.'" *Id.* at 665, *quoting Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 211 (1964). In *Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965), the court noted that "employers and unions are required to bargain about wages, hours and working conditions" and found that that requirement "weighs heavily in favor of antitrust exemption for agreements on these subjects." *Id.* at 689. And in *Connell,* 421 U.S. 616, the court's most recent discussion of the nonstatutory exemption, the court stated that the exemption results from the need for "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Id.* at 622.

As these cases amply demonstrate, the focus of the nonstatutory labor exemption is collective bargaining.[7] The court's language reveals its sensitivity to Congress' desire that employers and employees jointly determine wages, hours and working conditions by negotiating with each other in good faith. The exemption is a recognition that the negotiation process would be undermined if the antitrust laws could be used to frustrate the product of the negotiations.

[7] The lower courts have echoed the language of the Supreme Court. *E.g., Mackey v. National Football League,* 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977) ("the basis of the nonstatutory exemption is the national policy favoring collective bargaining"); *Zimmerman v. National Football League,* 632 F. Supp. 398, 403 (D.D.C. 1986) ("The exemption reflects a national policy encouraging collective bargaining over wages and working conditions").

To say that collective bargaining is at the heart of the exemption, however, is not to say that the exemption applies only to collective bargaining agreements. *Connell,* for example, demonstrates that the availability of the exemption does not turn on whether the challenged restraint is part of a formal labor contract. The court in that case reviewed an agreement between a building contractor and a union in which the building contractor promised to hire only subcontractors that had signed a collective bargaining agreement with the union. The union neither represented nor had any intention of representing the builder's own employees. The court denied the exemption, but there is no suggestion that it did so merely because the subcontracting agreement was not part of a collective bargaining agreement **[12]** between the builder and the union. On the contrary, as noted by the Ninth Circuit in an opinion by Judge (now Justice) Kennedy, the *Connell* Court undertook an extensive analysis of the competitive effects of the subcontracting agreement—an analysis that would have been unnecessary if the exemption were limited to restraints imposed by collective bargaining agreements. *Richards v. Neilsen Freight Lines,* 810 F.2d 898, 905–906 (9th Cir. 1987); *accord, Zimmerman v. National Football League,* 632 F. Supp. 398, 404 (D.D.C. 1986).

On the other hand, the cases also demonstrate that concerted conduct does not automatically qualify for the exemption simply because it is motivated by labor concerns. *Connell* again is an appropriate example. There the court denied the exemption even though the agreement between the contractor and the union was clearly motivated by labor concerns—the unions' desire to organize subcontractors (and, presumably, the contractor's desire to avoid picketing and other disruptions of its business by the union). The court said:

> This record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible. This goal was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from non-union firms. But the methods the union chose are not immune from antitrust sanction simply because the goal is legal.

421 U.S. at 625. In *United Mine Workers v. Pennington,* 381 U.S. at 664–65, the court stated that not even a negotiated agreement on a mandatory subject of bargaining is automatically exempt from antitrust scrutiny if it seeks to prescribe labor standards outside the bargaining unit. Thus, motivation by labor concerns is only a

necessary and not a sufficient condition for application of the nonstatutory exemption.

Applying the principles from the preceding two paragraphs, we cannot automatically deny respondents the nonstatutory exemption on the ground that their showroom hours agreement is not a collective bargaining agreement, nor can we automatically grant the exemption because the agreement is alleged to have been spurred by labor concerns. Unfortunately, these principles take us no farther in the analysis.

The parties offer alternative approaches for determining whether a particular agreement is entitled to the nonstatutory labor exemption. Complaint counsel argue that the exemption is warranted in only three situations, "all of which involve the **[13]** collective bargaining process," CAB at 38: (1) where there is an actual agreement between labor and non-labor parties; (2) where non-labor parties have collaborated in preparation for collective bargaining; and (3) where non-labor parties have engaged in concerted offensive or defensive tactics during the course of the collective bargaining process. *Id.* at 38–39. Respondents, on the other hand, urge us to hold that concerted action is exempt whenever it "results from a dispute over labor concerns, and affects primarily those concerns." RAB at 21.

Rather than endorsing either of the approaches advanced by the parties, we rely on general principles derived from the case law. The vast majority of nonstatutory labor exemption cases involve some sort of concerted activity or agreement between a union and an employer—usually, but not always, a collective bargaining agreement. Few of the cases cited to us, and none decided by the Supreme Court, address what we are faced with here: an agreement involving only employers. Nevertheless, those few cases clearly show that the nonstatutory labor exemption protects employer agreements only when those agreements are part of the give-and-take of a negotiation process.[8]

[8] The few employer-agreement cases all involved formal collective bargaining situations in which impasse had been reached before the employers took joint action. *E.g., Amalgamated Meat Cutters & Butchers Workmen of North America, Local Union No. 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979) (food wholesaler agreed to loan employees to grocery store to replace striking employees; court held agreement was not unlawful because store's purpose in using Wetterau's employees was to keep its business in operation and thereby to enhance its bargaining power); *Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969) (*Detroit News* locked out its employees in support of the *Detroit Free Press;* in *dicta*, court reasoned that because the *News* was negotiating with same local over many of same issues as the *Free Press*, the *News* was acting in its own legitimate bargaining interest in collaborating with competitor); *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298 (E.D. Wash. 1981) (lockout agreement; in *dicta*, court stated that employers were

(footnote continued)

Respondents' agreement on showroom hours was not part of a labor negotiation process. On the contrary, respondents admit that, to the extent the agreement was motivated by labor concerns, it was designed to *prevent* collective bargaining. Immunizing respondents' concerted activity from the antitrust laws therefore would not serve the congressional policy of **[14]** encouraging employers and employees to work out their differences through arm's-length, good faith bargaining.

Both parties also cite *Mackey v. National Football League,* 543 F.2d 606 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977), as a test for the applicability of the nonstatutory exemption. In *Mackey,* the Eighth Circuit reviewed Supreme Court precedent and concluded that the exemption is available only when (1) the restraint of trade "primarily affects only the parties to a collective bargaining relationship"; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the agreement is the product of bona fide, arm's-length bargaining. *Id.* at 614. As we have already observed, the respondents' hours restriction was not established through bona fide, arm's-length bargaining between dealers and employees. Thus, the third part of the *Mackey* test is fatal to the respondents' nonstatutory exemption defense.[9]

Respondents assert that the nonstatutory exemption should apply as long as they were responding to the demands of their employees in establishing shorter hours. But it appears that satisfying labor demands was not the respondents' sole motivation; as discussed below in Section III, dealers clearly recognized economic advantages in agreeing to reduce hours. In any event, as the Supreme Court indicated in *Connell* and *Pennington,* motivation by labor concerns is not sufficient by itself to invoke the exemption. To hold otherwise would open up the exemption to abuse, not to mention difficulties of application in cases where the evidence of competitors' motivation is conflicting, incomplete, or subject to multiple interpretations. Employers would be able to band together to establish any number of anticompetitive restraints under the aegis of responding to labor demands.

The mere fact that sales employees benefit from the hours restraint

entitled to the nonstatutory labor exemption because complaint alleged that lockout was intended to force concessions from the union and agreement furthered "legitimate employer interests in collective bargaining").

[9] Because the third part of the *Mackey* test is not satisfied, we need not consider for purposes of applying the test whether the hours restriction "primarily affects" only the dealers and their employees or whether hours of operation would be a mandatory subject of bargaining.

also cannot justify granting an exemption. It is not surprising that employees would favor the agreement, since they have the same incentive to reduce competition as the dealers.[10] But if an exemption were held to apply to any agreement or concerted activity that "benefits labor," like one held to cover any agreement "motivated by labor concerns," it would be an exemption that swallows the rule. Taken to its logical conclusion, such an exemption would permit employers to fix prices in order to satisfy employee demands for higher wages—a proposition the Supreme Court has soundly rejected. *See Allen Bradley Co.*, 325 U.S. 797.

Respondents contend that *Jewel Tea*, 381 U.S. 676, compels the conclusion that the nonstatutory exemption applies in this case. In *Jewel Tea*, unions representing virtually all of the butchers in the Chicago area negotiated a collective bargaining agreement with the representatives of 9,000 meat retailers. Among other things, the agreement forbade the sale of meat outside the hours of 9:00 a.m. to 6:00 p.m. Jewel, a grocery store chain that wanted to operate self-service counters in the evening, filed suit under the Sherman Act to invalidate the marketing hours provision. The Supreme Court framed the issue as "whether the marketing-hours restriction . . . is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." *Id.* at 689–90.

The court found that the dispute between Jewel and the unions boiled down to a narrow factual question: whether night operations were possible without affecting butchers' workloads. *Id.* at 694. The court stated that if it were true that self-service markets could actually operate without infringement of butchers' interests, Jewel's antitrust claim would have "considerable merit." *Id.* at 692. The defendant unions, however, had convinced the trial court that night operations would be impossible without affecting butchers. The court, saying that its function was "limited to reviewing the record to satisfy ourselves that the trial judge's findings are not clearly erroneous," *id.*

[10] The incentive may be especially strong in a case where, as here, sales employees work on commission. The effect of losing a sale to a competing business (in this case, a dealership that keeps longer hours) or to another salesperson at the same business (if extended hours permit customers to return when the original salesperson is off duty) is probably more obvious to an employee whose income is tied to individual transactions than to one who works on salary.

at 694, found sufficient support for the lower court's conclusions and therefore held that the marketing hours provision was exempt from Sherman Act scrutiny. *Id.* at 697.

To be sure, *Jewel Tea* and the present case have superficial similarities: both involve a restriction on marketing hours and efforts by labor unions to obtain shorter working hours. But in *Jewel Tea,* unlike the case before us, the agreement was one to **[16]** which both employees and employers were parties. Moreover, there was no question in *Jewel Tea* that the restrictive agreement had been reached through bona fide, arm's-length bargaining. Indeed, the Supreme Court assumed the existence of bona fide negotiations in framing the issue to be resolved. *Jewel Tea,* then, does not tell us how the court would view an agreement to restrict hours of operation involving only employers, reached without arm's-length negotiations with employees.

This would be a much simpler case if, as in *Jewel Tea,* the agreement to limit showroom hours were contained in a formal collective bargaining agreement executed after direct negotiations. Respondents mischaracterize the foregoing observation as mere preference for one method of resolving a labor dispute (unionization and collective bargaining) over another (making concessions to avoid unionization). The distinction is not one of mere preference, however. As discussed above, the nonstatutory labor exemption protects labor-related agreements not because the content of such agreements is always "good," but because striking down the agreements would undermine the integrity of the collective bargaining process. Employers and employees would have little incentive to negotiate an agreement in good faith if they knew that the other party—or even a stranger to the negotiations—could overturn the agreement on antitrust grounds. Conversely, if no negotiations have taken place or are expected to take place, the integrity of the negotiating process cannot be threatened by application of the antitrust laws. Thus, the means of reaching the agreement under review are critical in determining whether the exemption applies.

The ALJ cited *Jewel Tea* in accepting the respondents' proposition that concerted activity is entitled to the nonstatutory exemption whenever it is motivated by labor concerns and it primarily affects those concerns. ID at 44. We find no such holding in *Jewel Tea.* That case holds only that a marketing hours restriction may be exempt when it is "intimately related to wages, hours and working condi-

tions" and when it has been established through "bona fide, arm's-length bargaining." 381 U.S. at 689–90. The respondents have produced no other authority for their position, and we find none. We therefore hold that the ALJ erred in adopting respondents' test for the applicability of the exemption.[11] **[17]**

Respondents next argue that, even if the exemption is limited to the collective bargaining process, the exemption should apply here. Respondents assert that the sales employees used a number of tactics, including the threat of unionization, to achieve shorter hours, and that "the sum total of these activities constituted the collective bargaining process." RAB at 28. The ALJ apparently was persuaded by this argument, *see* ID at 53–54, but we reject it.[12] The ALJ relied in part on the collective bargaining agreements signed by some individual dealerships. *See, e.g.*, IDF 229–231, 243, 288–299. These agreements, however, did not establish *bargained-for* showroom hours. The agreements merely incorporated, by means of maintenance of standards provisions, the pre-existing hours reductions orchestrated by DADA. Thus, those agreements did not memorialize hours limitations negotiated between dealers and employees; they simply perpetuated the results of earlier collusion. *See Zimmerman v. NFL*, 632 F. Supp. at 405 (discussing "the requirement of a bargained for, as opposed to a unilaterally imposed, condition"). In any event, very few dealers signed such agreements.[13]

Moreover, even if the agreements signed by individual dealerships had contained bargained-for hours restrictions, those agreements are not the ones before us in this case. The **[18]** agreement before us is the agreement among dealers to establish *uniform* showroom hours. As complaint counsel point out, this agreement is completely separate from whatever negotiations may have gone on at individual dealer-

[11] Although the ALJ is correct that "the labor laws protect not just the negotiation of collective bargaining agreements between the employer and the union, but the full relationship among employees and employers," ID at 52–53, that does not mean that the nonstatutory labor exemption protects everything the labor laws do. It would be simple enough for the Supreme Court to hold that the antitrust laws must give way whenever "labor concerns" or "labor policy" is implicated, but we see no indication that it has done so. On the contrary, it appears that the court has taken pains to limit the scope of the exemption. The court's stated goal, after all, is to *accommodate* antitrust and labor policies.

[12] We agree with the ALJ's conclusion that the decision not to form a multi-employer bargaining unit is not fatal to respondents' nonstatutory labor exemption defense. *See, e.g., Newspaper Drivers & Handlers,* 404 F.2d 1159; *Plumbers & Steamfitters,* 511 F. Supp. 1298; *Wetterau Foods,* 597 F.2d 133. That conclusion, however, does not release respondents from having to show that their agreement arose in the context of bona fide, arm's-length negotiations with employees.

[13] The Initial Decision summarizes the hours provisions of contracts signed by seven dealers. IDF 288–299. All but one were maintenance of standards provisions. It is difficult to see how the remaining contract, a 1970 agreement between the ASA and Crestwood Dodge, could by itself support an argument that the market-wide restriction orchestrated by DADA arose in a collective bargaining context.

ships. Thus, it would be improper to impute to the respondents' agreement any protection the nonstatutory exemption may offer individual dealer-employee negotiations.

Respondents have not pointed to any evidence that the agreement among the *dealers* resulted from activity that could fairly be characterized as arm's-length negotiation with their sales employees.[14] On the contrary, the evidence shows that the dealers adopted the hours limitation in order to *avoid* arm's-length negotiation. As we have already stated, it would be inconsistent with the policy underlying the exemption to immunize concerted acts by employers that are intended to undermine the association of employees and to head off collective bargaining.

In short, none of respondents' arguments persuade us that the hours restraint is entitled to protection by the nonstatutory labor exemption. Our conclusion is consistent with the clear purpose of the exemption: to preserve the integrity of the negotiation process. The relevant question, given that purpose, is whether application of the antitrust laws to the agreement in question would somehow undermine past negotiations between employers and employees or reduce the incentives for them to negotiate with each other in the future. In this case, application of the antitrust laws would not have these effects. Respondents here agreed among themselves, not with their employees. Thus, finding that the agreement is an unlawful restraint of trade would not upset any careful balance of interests negotiated between employers and employees. Nor would it affect expectations that a settlement negotiated in the future—whether through formal, multi-employer collective bargaining or arm's-length talks at individual dealerships—would be protected from antitrust sanctions. For these reasons, we hold that the nonstatutory labor exemption does not apply to the respondents' agreement.

III. Restraint of Trade Analysis

Having concluded that the respondents' concerted activity is not immune from antitrust scrutiny, we turn to the question of whether that activity constitutes an unlawful restraint of **[19]** trade.[15] At the outset, we are faced with selecting the appropriate method of analyzing the respondents' agreement. The case law is not especially

[14] We accordingly reject the ALJ's conclusion that respondents acted "in concert with sales employees and their union representatives" in adopting and adhering to the hours restraint. IDC 1.

[15] Restraints of trade that violate Section 1 of the Sherman Act, 15 U.S.C. 1, are "unfair methods of competition" under Section 5 of the FTC Act. *FTC v. Cement Institute*, 333 U.S. 683, 694 (1948).

helpful in this regard.[16] We note, however, that in a fairly recent case involving a restriction on business hours, the court used a *per se* analysis in finding a violation of the Sherman Act. *State of Tennessee ex rel. Leech v. Highland Memorial Cemetery, Inc.*, 489 F. Supp. 65 (E.D. Tenn. 1980).

The parties have engaged in the usual debate over whether to apply the *per se* rule or the rule of reason, but as we recently said in *Massachusetts Board of Registration in Optometry,* Docket No. 9195, slip op. at 10 (FTC June 13, 1988), the utility of that approach has been called into question by the Supreme Court's recent pronouncements on horizontal restraints. In *Mass. Board,* we reviewed the court's decisions in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984), and *FTC v. Indiana Federation of Dentists,* 476 U.S. 447 (1986). We observed that in all three of these cases, the court avoided applying the *per se* label to a restraint that arguably fit within a traditional *per se* category. The court then went on to consider, but without a full-blown market analysis, the procompetitive justifications offered for the restraint.

BMI, NCAA, and *IFD,* read together, suggest that the *per se* rule and the rule of reason are converging. Indeed, in *NCAA* the court expressly stated that there is often no bright line separating *per se* from rule of reason analysis, and that the essential inquiry is the same under either rule: "whether or not the challenged restraint enhances competition." 468 U.S. at 104 **[20]** and n. 26.[17] In *Mass. Board,* we concluded that the analysis undertaken in *BMI, NCAA,* and *IFD* boils down to the following three-step inquiry:

> First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and reduce output"? For example, horizontal price-fixing and market division are inherently suspect because they are likely to raise price by reducing

[16] It appears that the only two Supreme Court cases involving a restriction on business hours are *Jewel Tea,* 381 U.S. 676, and *Chicago Board of Trade v. United States,* 246 U.S. 231 (1918). In *Jewel Tea,* the Court was not required to decide whether to apply the per se rule or the rule of reason because it held that the marketing hours restraint was immune from antitrust review. In *Chicago Board of Trade,* the restriction did not actually prohibit doing business outside the approved hours of operation, but only the price at which business could be transacted during those hours.

[17] This statement is a departure from conventional wisdom, which teaches that the only inquiry under the *per se* rule is whether the restraint falls within a specific category (*e.g.,* "price fixing" or "customer allocation"). Once found to fall within one of these categories, the restraint is condemned without further inquiry. *See NCAA,* 468 U.S. at 103–04 ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct").

output. If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (*e.g.*, by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry —there are no likely benefits to offset the threat to competition.

Slip op. at 12–13. By adopting this method of analysis, we focus on the economic realities and substantive concerns about **[21]** competition that ultimately must govern our decisions.[18] We now apply the three-step inquiry to the respondents' showroom hours agreement.

We view the respondents' agreement to limit showroom hours as inherently suspect. Common sense alone suggests that the hours a business is open to serve customers is a form of output. A consumer may consider any number of factors in deciding where to shop, including price, selection, location, reputation, and service, but surely one of those factors is whether the business provides hours that are convenient to the consumer's schedule. If several competitors are identical in all respects except the business hours they offer, the consumer will choose which ones to patronize on the basis of that difference; the consumer is unlikely to remain indifferent.

We see no reason to believe that car dealers are less susceptible to this phenomenon than other retail businesses. Indeed, a car dealer, like other retailers, is not a manufacturer but rather a provider of sales and support services. Although units produced or sold may be a useful measure of a manufacturer's output, the output of a car dealer is not obviously measured in such terms alone.

Dicta from the *Jewel Tea* case indicate that the Supreme Court also recognizes business hours as a form of output. Justice White's opinion announcing the judgment of the court acknowledged that the

[18] As we recognized in *Mass. Board*, slip op. at 12 n. 12, the Supreme Court has at times continued to follow a more traditional line in its opinions. *See, e.g., Arizona v. Maricopa County Medial Society*, 457 U.S. 332 (1982) (Court held price-fixing agreements *per se* illegal and therefore refused to consider alleged procompetitive justifications); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (similar holding). Our method of analysis is consistent with the traditional approach and would not lead to different results in such cases.

agreement to restrict meat counter hours was an "obvious restraint on the product market" and that its effect on competition was "apparent and real." 381 U.S. at 692, 691. Justice Douglas, in dissent, pointed out that "[s]ome merchants relied chiefly on price competition to draw trade; others employed courtesy, quick service, and keeping their doors open long hours to meet the convenience of customers." *Id.* at 737. He further observed that immunizing the restriction under the nonstatutory labor exemption would mean that Jewel could not "use convenience of shopping hours as a means of competition." *Id.* at 736.

These common-sense impressions are solidly grounded in economic theory. We presume that consumers allocate their time **[22]** in the manner they think is most efficient or beneficial to them. By completely eliminating certain shopping hours, the respondents' agreement forces consumers to shift their car shopping to hours they otherwise would not have chosen for that activity. The forced restructuring of their schedules raises the opportunity cost to consumers of car shopping. This increase in costs encourages consumers to spend less time comparing prices, features, and service, and thereby reduces pressure on dealers to provide the prices, features and services consumers desire. And even if the amount of time spent shopping remains unchanged, the restriction reduces efficiency, since without it consumers could reorganize their activities in a way that would increase their overall satisfaction.

Moreover, there is no economic difference between an agreement to limit shopping hours and an agreement to increase price. One commentator has illustrated this point with, appropriately, an example of automobile dealers agreeing to close on Sundays:

> Leisure and money are merely different forms of income for producers and different forms of payment by consumers. When they are obtained by agreed restrictions of output, there is no valid means of distinguishing between them. An example may make the point clear. It is, presumably, more likely that a judge in the Brandeis tradition would uphold an agreement by automobile dealers to close on Sundays than an agreement by the same dealers to add $200 to the price of each car. Yet there is no difference between the cases. Both are limitations upon competition whose sole purpose is to increase the dealers' income by restricting output. The output in one case is the number of cars sold (which will decrease with the raised price); the output in the other case is the provision of convenience of shopping to consumers (which will decrease with the Sunday closing). The identity is shown further by the ability of the dealers to switch the results of the two agreements. Auto dealers with Sundays off can work elsewhere on those days, converting leisure to money; and dealers with higher prices and profits can work fewer hours, converting money to leisure. . . .
>
> From the consumers' point of view such agreements are also indistinguishable.

Consumers who lose the convenience of shopping on Sunday are deprived of something that is as much an economic good as is money. There is no acceptable way for a judge to decide that a restriction in the offering of a **[23]** convenience is any less objectionable than a restriction in the number of automobiles sold.

Bork, *The Antitrust Paradox* 85–86 (1978).

Our view of the respondents' agreement finds support not only in common sense and economic theory, on both of which we may reasonably rely, *IFD*, 476 U.S. at 456, but also in the record. The evidence indicates that respondents expected the hours restriction to benefit them by limiting comparison shopping. For example, in a letter to a dealer, DADA's executive vice president explained the evening closing program as follows:

Our association has worked on this evening closing project for several years, to a point where practically all new car dealers are closed three evenings a week. This situation has proven popular, not only with the dealership employees, but with the dealers themselves. They have found that they have been able to somewhat reduce their costs, and more importantly they have improved their grosses. This has been brought about by the fact that with fewer shopping hours, the public can devote less time to shopping, and consequently forcing down prices.

CX 171. In another letter urging a dealer to join the evening closing program, the executive vice president noted that "the line groups with 100% cooperation have found that this program minimizes shopping by prospective buyers." CX 166. Earlier, DADA had issued a bulletin stating that most dealers liked the program "because it improves employee morale, cuts down shopping, and contributes generally to a better buying climate." CX 140A.

That the dealers and associations were aware of the underlying competitive forces cannot be denied. In one of the letters cited above, DADA's executive vice president admitted his "fear" that "some of the dealers who are now cooperating may decide to stay open if they see that a few others are doing so." CX 166. Comments in response to DADA's survey on Friday evening closings showed that this fear was well-founded. One dealership stated that it "definitely want[ed] to close on Friday nights," but that it was unable to do so "because Stark Hickey refuses to close. If Stark Hickey will close, we will close." CX 156B. Other dealer comments were similar.[19] What the

[19] *E.g.*, comment of Dick Lurie Ford ("Other dealers in area are open Friday night"); comment of Dean Sellers, Inc. ("Our brother Ford dealers are open on Friday evenings. This forces us to remain open. If these dealers will close Fridays, we will be glad to do so"); comment of Avis Ford ("Will close only if all are closed, not just a majority"); comment of North Bros. G.C. ("Major competitors open"); comment of Ed Schmid

comments signify **[24]** is that competitive pressures prevented individual dealers from reducing hours unilaterally.

In another document, the Cadillac line group urged its members not to skirt the Saturday closings by making appointments or even being around the lot on that day.[20] The memo summed up the effect of the restriction as follows: "Every one closed on Saturday means no advantage to anyone and no disadvantage to anyone!" CX 101. The latter statement, in our view, neatly expresses what this case is all about—except, of course, for the resulting disadvantage to consumers.

Other factors in the record further persuade us that showroom hours are an important basis of competition. One is the evidence that numerous dealers resisted the DADA evening closing program and that, since 1973, many have tried to open their showrooms on Saturday or on one of the prohibited evenings. *See* IDF 27–33, 246–276. Another is the finding, which respondents do not dispute, that Detroit is the only metropolitan area in the country in which almost all dealers are closed on Saturdays. *See* IDF 53–55.[21] The former factor suggests that some dealers in Detroit see a competitive advantage in keeping longer hours than their rivals, and the latter suggests that in cities where there is no agreement to keep showrooms closed, competitive forces lead dealers to keep them open.

The fact that overt coercion has been needed to prevent dealers from reopening is yet another indication that hours of operation are a form of competition among dealers. Since 1973, **[25]** demonstrations and vandalism have thwarted attempts by individual dealerships to extend their hours. The ALJ cited over two dozen instances in the 1970s and 1980s in which a dealer has tried to open during one of the times covered by the agreement but eventually given up because of demonstrations, threats, and property damage. *See* IDF 246–276. The occurrence of these acts of intimidation supports an inference that dealers who kept longer hours presented a competitive threat to dealers who complied with the agreement. Sales employees from rival

("Would like to close *only* if nearby Ford dealers did"); comment of Krajenke Buick ("We have been closing and are still closing, but, have been giving some consideration to keeping open since Walker Buick Sales, Woody Pontiac, etc. are keeping open"). CX 156B-C.

[20] The memo noted that Saturday closings had begun as a method of discouraging unionization, but went on to say that dealers had experienced no drop in volume; in fact, according to the notice, "grosses actually went up." CX 101.

[21] Respondents characterize the second factor as "irrelevant," RAB at 60, but in *Indiana Federation of Dentists* the Supreme Court thought it relevant that "there was evidence that outside of Indiana, in States where dentists had not collectively refused to submit x rays, insurance companies found little difficulty in obtaining compliance by dentists with their requests." 476 U.S. at 456.

dealerships undoubtedly demonstrated against dealers who violated the agreement because they were afraid that their own employers would follow suit in extending hours. But rival employees would follow suit only if they were losing customers to the dealers who remained open—which in turn would indicate that showroom hours are a basis on which dealers compete for customers.

In short, common sense, economic theory, and the evidence convince us that showroom hours are an important form of output and a dimension in which new car dealers clearly compete. Thus, a horizontal agreement to limit showroom hours is one that "appears likely, without some efficiency justification, to 'restrict competition and reduce output.'" *Mass. Board,* slip op. at 12.

Accordingly, we turn to the second step of the inquiry: whether there are plausible efficiency justifications for the agreement. Although respondents offered three efficiency justifications in the proceeding below, none are discussed in their appeal brief. Respondents instead rely on *Buffalo Broadcasting Co., Inc. v. ASCAP,* 744 F.2d 917 (2d Cir. 1984), *cert. denied,* 469 U.S. 1211 (1985), and *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.,* 710 F.2d 1366 (9th Cir. 1983), for the proposition that procompetitive benefits need not be advanced if the restraint has not first been shown to have significant anticompetitive effects. RAB at 57. Whether or not that proposition is correct, respondents' reliance on it is misplaced. Here, as discussed at length above, complaint counsel have met their burden of showing that the restraint adversely affects competition.[22] **[26]**

[22] In the proceeding below, respondents offered as efficiency justifications (1) lower dealer overhead costs, (2) the ability to attract higher-quality sales personnel, and (3) the prevention of unionization. We agree with complaint counsel that none of these is plausible. First, a cost efficiency occurs only if the agreement enables the respondents to produce the same output at less cost, or more output at the same cost. In either case, cost *per unit of output* decreases. Here, unit costs did not decrease. Although dealer overhead may have been reduced, so was output (in this context, showroom hours). Thus, cost per unit of output (overhead per showroom hour) was unaffected by the agreement

The second proposed efficiency is equally implausible. Although a shorter work week, like any other desirable working condition, might help dealers attract better employees, no explanation has been given why an *agreement* among dealers is necessary to bring this about. Any dealer who believes that reducing hours will attract better sales personnel can reduce hours unilaterally. In fact, it may be in that dealer's interest *not* to have an agreement, because it will be more difficult to attract the best candidates if other dealers are offering the same hours. The only thing that might prevent the dealer from acting unilaterally is the need to stay open longer to meet competition from other dealers. But respondents obviously may not rely on the argument that an agreement is necessary because otherwise competition would force them to keep longer hours. Such arguments have been characterized as "nothing less than a frontal assault on the basic policy of the Sherman Act." *IFD,* 476 U.S. at 463, *quoting National Society of Professional Engineers v. United States,* 435 U.S. 679, 695 (1978).

We also find no merit in the third proposed efficiency. Given the national policy favoring the association of employees to bargain in good faith with employers over wages, hours and working conditions, we do not believe that preventing unionization can be a legitimate justification for an otherwise unlawful restraint

Because no valid procompetitive justifications have been advanced in support of the restraint, we need not proceed to the third step of the *Mass. Board* analysis. We therefore hold that respondents' agreement is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

Respondents argue that this holding is precluded by the ALJ's findings that prices of new cars in the Detroit area did not go up as a result of the respondents' concerted action.[23] We find this argument unpersuasive for several reasons. First, the Supreme Court rejected a similar argument in *Indiana Federation of Dentists.* In that case, the dentists contended that withholding x-rays could not be held an unreasonable restraint of trade absent a finding that the practice resulted in more costly dental services for consumers. The court, however, held that an **[27]** agreement to withhold information used to determine whether purchases were cost-justified was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices . . . than would occur in its absence." 476 U.S. at 461–62. We think an agreement that limits consumers' ability to comparison shop is also likely enough to disrupt the market's price-setting mechanism so as not to require further proof. And even if further proof were required, we agree with complaint counsel that the relevant indicator is not, as the ALJ thought, whether prices increased in absolute terms, but rather whether prices were above competitive levels.[24]

In any event, the parties' focus on retail prices misses the point in this case. As noted above, even if out-of-pocket expenses are not increased, consumers pay higher prices as a result of the hours restriction in the form of reduced convenience and service. The income transferred from consumers to dealers is in the form of leisure time, not monetary profits. These losses are not pecuniary, but they are no

[23] Specifically, the ALJ found no evidence that the Saturday closings caused an increase in retail prices of cars in the Detroit area, or that the hours reductions increased car dealers' gross margins on sales. IDF 300, 301.

[24] The ALJ made no findings on whether prices are above competitive levels. We observe, however, that prices may effectively have risen above competitive levels if they simply remained the same after the agreement. Holding all other factors constant, we would expect car prices to have gone down in response to dealers' lower overhead costs. If this did not occur, then consumers got less output (*i.e.*, fewer shopping hours) for the same amount of money after the agreement was implemented. This is no different from increasing the price of a stick of chewing gum by keeping the package price the same but putting fewer sticks in the package.

less real or harmful to consumers than higher prices for goods and services. Bork, *supra,* at 86.[25] **[28]**

Respondents also contend that market conditions allegedly unique to the Detroit metropolitan area result in consumers having little need or desire to shop for new cars on Tuesday, Wednesday, or Friday evenings or on Saturdays.[26] As a result, respondents argue, comparison shopping is not inhibited by the hours limitation. We find this argument equally unpersuasive. Even if longer showroom hours would in fact be completely useless to Detroit consumers, the respondents are not justified in making that judgment on behalf of their customers. *IFD,* 476 U.S. at 462. Presumably, if longer hours are uneconomic, the market itself would soon lead dealers to shorten their hours of operation. *Id.*

In *IFD,* the court stated that "a refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." 476 U.S. at 459. We think showroom hours are at least as much a part of the "package of services" car dealers offer their customers as the forwarding of x-rays is of the "package of services" dentists offer their patients. Moreover, it is clear from the record that without the agreed-upon limitation, showroom hours would have been determined by the "ordinary give and take of the market place." *Id., quoting National Society of Professional Engineers,* 435 U.S. at 692. We hold that,

[25] Complaint counsel and respondents both presented extensive expert testimony on the hours restriction's impact on prices, and the parties spend a good portion of their briefs criticizing each other's experts. We find the expert testimony inconclusive. We believe, however, that our analysis of the market forces underlying dealer showroom hours is more than sufficient to support the conclusion that the hours limitation restricts output and harms consumers.

Although respondents characterize any anticompetitive effects as "abstract or theoretical," RAB at 54, it is only the amount of harm, not its existence, that is "abstract." The likelihood that a judge would have difficulty computing damages in a successful action by a private plaintiff does not by itself demonstrate that harm to consumers is only "theoretical." *See Highland Memorial Cemetery,* 489 F. Supp. at 68 (court agreed that injury to consumers was too small and speculative to award damages, but nevertheless held that restriction on business hours affected competition).

[26] Specifically, respondents point out that auto workers and other industrial workers in Detroit are shift workers who often get off work in the morning or early afternoon and thus can shop for cars on weekdays. They further point to the "high percentage" of Detroit-area families who have members working for car companies and who therefore qualify for employee purchase plans under which the price of the car is predetermined. Respondents also cite evidence that Saturday sales were declining in the 1960s and that dealers who have opened on Saturdays in recent years have done little business. Of course, if business declined, it may have as much to do with customers being subjected to intimidation and harassment at dealerships as

absent some procompetitive efficiency justification, **[29]** such an agreement cannot be squared with the antitrust laws. *See id.*

IV. Other Defenses

Respondents raised a number of other defenses in the proceeding below. These included the statutory labor exemption, coercion by the sales employees, evidence that certain respondents negotiated collective bargaining agreements restricting hours of operation, violation of due process caused by inordinate delay in issuing the complaint, an exemption implied from the Economic Stabilization Act of 1970, and the absence of evidence connecting certain respondents to the alleged concerted action. The ALJ dismissed the complaint on the basis of the nonstatutory labor exemption and therefore did not rule on these other defenses. We have authority under § 3.54 of our Rules of Practice to decide these issues without remand. Because they were adequately briefed in the parties' post-trial submissions to the ALJ, we proceed to rule on them.[27]

Respondents first contend that their joint conduct in closing showrooms is protected by Section 20 of the Clayton Act, 29 U.S.C. 52. The notion that the section applies to joint conduct by employers, however, is inconsistent with the Supreme Court's interpretation of the statutory labor exemption. In *Connell,* 421 U.S. at 621–22, and *Pennington,* 381 U.S. at 662, the Court explicitly held that neither the Clayton Act nor the Norris-LaGuardia Act exempts concerted action or agreements between unions and nonlabor parties. Clearly, if bilateral agreements between employers and employees are not within the scope of the statutory exemption, agreements involving only employers, such as the one we have in this case, are not within its scope. Such concerted employer conduct is protected, if at all, by the nonstatutory exemption.

Respondents cite a number of cases for the proposition that the statutory exemption is applicable to employers. None of them is persuasive. Two of the cases, *Kennedy v. Long Island Railroad Company,* 319 F.2d 366 (2d Cir.), *cert. denied,* 375 U.S. 830 (1963), and *Clune v. Publishers Association of New York City,* 214 F. Supp 520 (S.D.N.Y.), *aff'd,* 314 F.2d 343 (2d Cir. 1963), were decided before *Pennington* and *Connell.* In another, *Richards v. Neilsen Freight Lines,* 602 F. Supp. 1224 (E.D. Cal. 1985), *aff'd,* 810 F.2d

[27] We need not address the collective bargaining agreements signed by individual dealerships since we have already discussed that defense in connection with the nonstatutory exemption.

898 (9th Cir. 1987), the District Court held the statutory exemption applicable to an alleged union-employer conspiracy, not to concerted employer conduct. On appeal, the Ninth Circuit expressly declined to rule on the statutory **[30]** exemption question, finding that the nonstatutory exemption was applicable. 810 F.2d at 904.

Mid-America Regional Bargaining Association v. Will County Carpenters District Council, 675 F.2d 881 (7th Cir.), *cert. denied*, 459 U.S. 860 (1982), also involved an alleged union-employer agreement. The court's discussion focused on whether the agreement amounted to a conspiracy that, under *Pennington* and *Allen Bradley Co.*, 325 U.S. 797, would take the agreement outside the scope of the statutory exemption. The court held that the plaintiffs had failed to plead an *Allen Bradley*-style conspiracy. Thus, the *union's* conduct was entitled to protection by the statutory exemption. Because it would have been anomalous to hold that the agreement was exempt but that one of the parties nevertheless violated the antitrust laws by participating in it, the court also granted protection to the employers—but protection that was derivative of the union's.

In the last case cited by respondents, *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298 (E.D. Wash. 1981), the court dismissed the complaint for failure to state an antitrust claim. Nevertheless, the court went on to state in dicta that the defendants, who had agreed to lock out employees following an impasse in collective bargaining, would have been entitled to both the nonstatutory and the statutory labor exemptions. We agree that the nonstatutory exemption would have been applicable, but we reject the court's view that the statutory exemption may apply to concerted conduct in which employees do not participate. As noted above, that view is inconsistent with the Supreme Court's understanding of the statutory exemption.

Respondents' remaining arguments can be dealt with summarily. First, they contend that they should be absolved of antitrust liability because dealers were coerced into joining the agreement to restrict showroom hours. The record plainly shows, however, that the hours reductions began with DADA's evening closing "program," which DADA actively promoted and most dealers willingly agreed to follow. The record also shows that the coercion on which respondents rely generally took place at dealerships that were attempting to reopen after they had already conformed to the joint closings. We do not think respondents may excuse their decision to participate in the scheme by arguing that they later had to be forced to remain in compliance.

We also reject respondents' contention that they have been denied due process as a result of the length of time between the events challenged in the complaint and its issuance by the Commission. It is well settled that in order to show a denial of due process, respondents must demonstrate that they have been substantially prejudiced. *See, e.g., Arthur Murray Studio of Washington, Inc. v. FTC,* 458 F.2d 622, 624 (5th Cir. 1972). The voluminous record in this case refutes any claim that respondents **[31]** were not able to defend adequately against the Commission's charges; respondents called sixty witnesses and introduced approximately 2,400 documents. Nor have respondents shown any bad faith or misconduct by the government in causing the delay. Thus, this is not a case in which prejudice may be presumed. *See United States v. Naftalin,* 534 F.2d 770, 773–74 (8th Cir.), *Cert. denied,* 429 U.S. 827 (1976) ("where the government is not engaging in intentional delay in order to gain a tactical advantage over the accused, the defendant must affirmatively demonstrate prejudice").

We next consider respondents' claim that antitrust immunity for their December 1973 agreement on year-round Saturday closings can be implied from the Economic Stabilization Act of 1970, as amended in 1973, and presidential directives promulgated thereunder. The 1973 amendments and presidential orders were concerned with energy conservation in the wake of the Arab oil embargo. Respondents apparently concede that neither the amendments themselves nor any orders or regulations issued under presidential authority expressly authorized competitors to agree upon hours of operation. Instead, they rely on two speeches by President Nixon in November 1973 in which he called upon businesses voluntarily to curtail working hours. RX 285, 287. We agree with complaint counsel that this request for voluntary, unilateral action by business concerns is insufficient to immunize respondents' joint conduct.[28] Moreover, even if an implied exemption were found to have existed at one time, we doubt that it survived the end of the "energy crisis."

Finally, five respondents contend that there is insufficient evidence to link them to the hours reduction agreement.[29] We have reviewed

[28] Not only did President Nixon not call for agreements among competitors to limit hours, but Congress explicitly rejected a proposal that would have granted antitrust immunity for voluntary agreements among retail establishments to limit business hours. *See* H.R. 11450, 93d Cong., 1st Sess. § 114 (1973).

[29] The five are Al Dittrich, John Cueter, James Daniel Hayes, Gordon L. Stewart, and Stewart Chevrolet, Inc.

the evidence against the five respondents, and conclude that it is sufficient to connect them to the showroom hours agreement.[30] **[32]**

V. Scope of Relief

Because we reverse the dismissal of the complaint in this matter, we must determine what relief is appropriate to remedy respondents' violations of Section 5. The standard guiding us is whether the relief ordered is reasonably related to the unlawful conduct found. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611–13 (1946). The following discussion tracks the provisions of the order proposed by complaint counsel in their appeal brief. We agree with most of what complaint counsel suggest, but we tailor the order in several ways to make it more workable.

Part I of complaint counsel's proposed order prohibits each respondent from entering into, continuing, or carrying out any agreement with "any other dealer" in the Detroit area to adopt or adhere to particular hours of operation. This provision simply commands the respondents to stop violating the law in the manner described in this opinion, and we therefore adopt it.[31]

Part II of complaint counsel's proposed order prohibits dealership and individual respondents from exchanging information or communicating with any other dealer in the Detroit area **[33]** concerning hours of operation.[32] It also prohibits dealership and individual respondents from inducing or encouraging any other dealer in the Detroit area to adopt or adhere to particular hours of operation. Because it strikes at the means of forming an agreement to restrict hours, proposed Part II is reasonably related to the conduct found to violate the law in this

[30] Al Dittrich's testimony indicated that his decision to close Crestwood Dodge on Saturdays was linked to the actions of other Dodge dealers. Tr. 3177 ("I was going to go with the rest of the troops. If they decided they were going to close, I was going to close, too. I wasn't going to be the Lone Ranger standing out there").

John Cueter was the operator, although not an owner, of Tel-Twelve Dodge in November 1973. He represented Tel-Twelve Dodge at the meeting of the Greater Detroit Dodge Dealers Association at which the members, including Tel-Twelve Dodge, decided to close Saturdays. *See* CX 3348, 3357.

James Daniel Hayes became executive vice president of DADA on January 1, 1975. IDF 2. In that capacity, Hayes has been fully aware of DADA's closing policy and, in fact, has explained the policy to others on DADA's behalf. *See, e.g.*, Tr. 4619.

Gordon L. Stewart opened Stewart Chevrolet for business in 1980. Although he claims to have decided unilaterally to continue the previous owner's hours of operation, he also was Secretary-Treasurer of the Chevrolet Dealers Association on March 9, 1983 when the Association's board of directors decided to maintain Saturday closings. *See* CX 367, 389.

[31] Read literally, proposed Part I would forbid agreements only with dealers who are not respondents in this proceeding, and would not explicitly prohibit agreements with dealer associations. Accordingly, in our final order we modify Part I to forbid each respondent from entering into any agreement with "any other respondent or other dealer or dealer association" in the Detroit area.

[32] After two years, respondents would be allowed to exchange information to the extent necessary to incorporate individual dealers' business hours into lawful joint advertisements.

case. We therefore adopt it.[33] We also adopt proposed Part III, which parallels Part II but applies to association respondents.[34]

Respondents object to Parts I, II, and III of complaint counsel's proposed order on the grounds that these provisions would prevent them from taking otherwise lawful actions in the context of labor disputes and negotiations with sales employees. Respondents argue that the likely result of a Commission decision to strike down the showroom hours limitation will be widespread unionization of dealerships. Under *Jewel Tea,* respondents continue, dealers could not then refuse to bargain over hours of operation. The order, they contend, will limit their ability to engage in such negotiations on a multi-employer basis.

We think respondents' concerns about Parts I, II, and III of the proposed order (Parts I and II of our final order) are unfounded. The order does not prohibit respondents from invoking the nonstatutory labor exemption in a proceeding by the Commission to enforce the order. Moreover, it is not clear that writing an explicit exemption for labor activities into the final order would serve any purpose. Because the applicability of the nonstatutory exemption is a factual determination, explicit language would give respondents no greater certainty—and a court no greater guidance—on whether particular conduct is exempt than an order without explicit language. Such a proviso certainly would not prevent the Commission from filing suit to **[34]** enforce the order if it believed the exemption were being invoked improperly.[35]

Respondents' strongest objections are to Part IV of complaint counsel's proposed order. Part IV would mandate that each dealership and individual respondent be open for business on Saturday and on at least one weeknight other than Monday or Thursday for a period of not less than one year. Without such affirmative relief, complaint

[33] As in Part I, in Part II of our final order we substitute the term "any other respondent or other dealer or dealer association" for the term "any other dealer."

[34] We consolidate Parts II and III of the proposed order by substituting "each respondent" in the introductory clause of Part II and deleting Part III. The consolidated provision is Part II of our final order. We also delete the proposed order's definitions of "other dealer" and "other dealer association" since those terms do not appear in our final order.

[35] Respondents also urge us to delete the term "coercing" from Part II.B of the order, pointing out that allegations of violence and intimidation by respondents were dismissed at trial. We decline to take this action, for two reasons. First, it would be anomalous to issue an order prohibiting dealers from "requesting" or "recommending" that other dealers adopt certain hours, but permitting them to "coerce" other dealers. Second, Part II prohibits dealers from encouraging any person to perform any of the acts barred by that section. Because the ALJ found evidence that sales employees have picketed dealers who opened on Saturday, and because sales employees are among the persons dealers might "encourage," use of the term "coercing" in Part II.B is appropriate.

counsel argue, there is no realistic prospect of restoring showroom hours competition to the Detroit market. Dealers individually will decide to remain closed for fear of reprisals if they try to extend hours. Only if many dealers are open at the same time, making enforcement of the restriction difficult or impossible, will the fear of being singled out for enforcement be overcome.

We agree that a cease and desist order alone would be inadequate to remedy the respondents' violations of Section 5.[36] At the same time, we believe that an order requiring all dealers to be open certain hours may be inefficient and, in any event, is unduly restrictive. Accordingly, we have attempted in our final order to fashion a remedy that encourages competitive forces to operate.

Instead of declaring that all dealers shall be open on Saturday and an evening other than Monday or Thursday, we simply require dealers to maintain, for one year, a minimum of 64 hours of operation per week—leaving it to each dealer to decide how best to allocate those hours within the week.[37] Sixty-four hours is an appropriate figure given the evidence in the record of **[35]** dealer hours in other Midwestern metropolitan areas. At trial, complaint counsel introduced surveys of dealer hours in Cincinnati, Cleveland, St. Louis, and Chicago. CX 3701–3704. On the basis of the surveys, we calculate average weekly hours in those cities to be 64.5, 60.0, 62.0, and 68.0 hours, respectively. The figure we have chosen to incorporate into our order falls squarely in the middle of that range.

As a practical matter, it seems likely that dealers will find it most profitable to provide the additional hours on Saturday, weekday evenings, or both. Individual dealers' competitive circumstances may vary, however. Our formulation, unlike complaint counsel's, gives dealers the flexibility to adjust their hours to take advantage of marketplace opportunities or to meet competition from their rivals. For example, a dealer could reallocate hours from Saturday to Wednesday evening if a competitor decided to remain open every Wednesday until midnight. Only the total number of hours is governed by the order. This has the advantage of restoring the benefits the market would provide consumers absent the respondents' restraint of trade—more convenient shopping and additional leisure time—without forcing dealers to remain open at specifically-mandated hours that may be less beneficial to them than other currently unused hours.

[36] *A fortiori*, we reject respondents' assertion that if the Commission issues an order in this matter, it should issue only a declaratory order.

[37] The affirmative hours requirement is Part III of our final order.

Any costs that may be imposed by the minimum hours provision will be minimized by the relatively short duration of the requirement and the discretion given dealers to reduce their sales force by as much as two-thirds during non-weekday hours.[38] After the provision expires, respondent dealers will be free to choose their own hours of operation, but they will have to do so in a competitive environment.

Neither are we troubled by the prospect that our order will override "maintenance of standards" provisions in agreements signed by a few individual dealerships to the extent that such provisions purport to limit showroom hours. As we have discussed at length above, the maintenance of standards provisions do not incorporate bargained-for hours, but instead perpetuate the respondents' unlawful concerted action. Thus, they should not be insulated from the Commission's remedial authority.

Respondents strongly oppose any requirement that dealers extend their hours, invoking the Thirteenth Amendment's proscription of involuntary servitude, the common law rule against ordering specific performance of a contract for personal services, and the Norris-LaGuardia Act's prohibition on injunctive relief in cases arising out of a labor dispute. We **[36]** find little merit in these arguments. The first two can be dismissed simply by noting that the order does not compel any particular sales or management employee to work during the extended hours.[39] Dealers can meet the requirement to maintain longer hours in any way they choose, such as by hiring more sales employees or by implementing split shifts. *See, e.g.*, CX 3705, 3706 (advertisements explaining that dealership that remained open on Saturdays despite respondents' agreement had arranged a work schedule satisfactory to its employees).

The assertion that the labor statutes prohibit the Commission from entering an order in this case fares no better. In effect, this assertion simply restates respondents' labor exemption arguments, to which we have already responded. Clearly, it would make no sense to say that respondents' conduct can be held, consistently with the labor statutes, to violate the antitrust laws, but that those statutes nevertheless preclude the Commission from remedying the violation. Moreover, our

[38] "Non-weekday hours" is defined in the order to mean hours other than 9:00 a.m. to 6:00 p.m. Monday through Friday.

[39] Complaint counsel note that a few of the individual respondents are not affiliated with any respondent dealership, and that the proposed order might be interpreted as requiring these individuals personally to maintain weekly business hours. We have remedied that problem by adding language to the affirmative hours provision stating that the provision does not apply to individual respondents who neither own nor operate a dealership in the Detroit area.

order is consistent with, not contrary to, the policy of the Norris-LaGuardia Act. The Act's purpose is to prevent courts from interfering with legitimate organizing and bargaining activities. *See generally United States v. Hutcheson*, 312 U.S. 219, 229–31 (1940). It would be ironic to hold that the Act prevents us from striking down a restraint by which a group of employers sought to *avoid* unionization and bargaining.[40]

Respondents also argue that mandating extended hours is simply unwise. Pointing to the violence and vandalism that **[37]** marred previous attempts to establish Saturday hours, respondents contend that the order will expose dealers and their families to threats, property damage, and the risk of physical injury. We do not minimize the seriousness of the acts of intimidation appearing in the record. However, we agree with complaint counsel that the order will make such coercive activity impractical and give dealers the safety of numbers. In any event, the Commission cannot allow itself to be cowed from ordering effective relief in this case. To do so would invite future investigative targets to police anticompetitive restraints with force in hopes that the Commission would shy away from striking down the restraint.

Part V of complaint counsel's proposed order is a corrective advertising requirement. The Commission has authority to order corrective advertising when it is necessary to dissipate future effects of a company's past wrongful conduct. *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 756–61 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). We think corrective advertising is needed in this case. The record shows that virtually all new car dealers in Detroit have been closed on Saturday and three weekday evenings since December 1973. After fifteen years of restricted showroom hours, consumers—especially the generation of car buyers that entered the market after 1973—are likely to have the continuing impression that dealerships are closed on Saturday and on Tuesday, Wednesday, and Friday evenings.[41] Accordingly, Part IV of our final order requires DADA to

[40] Even if we were to assume for purposes of argument that Sections 4 and 5 of the Norris-LaGuardia Act apply to the Commission's order, the relief we enter would not be prohibited. Section 4 of the Act, 29 U.S.C. 104, provides that courts may not enjoin certain labor-related activities specified in that section. Section 5, 29 U.S.C. 105, precludes issuing an injunction on the basis that persons acting in concert with respect to the activities listed in Section 4 are engaged in an unlawful combination or conspiracy. The conduct prohibited by our order does not fall within any of the categories of Section 4. In particular, we reject respondents' contention that ordering dealers to maintain longer hours is equivalent to order sales employees to cease refusing to work those hours.

[41] The record supports that view. *E.g.*, CX 3805, Causley Tr. 66 ("I think in order to get the people back in

(footnote continued)

run a series of ads in the *Detroit News* and the *Detroit Free Press* devoted exclusively to explaining that dealers must offer expanded shopping hours for one year as a result of the Commission's order and that dealers may continue to offer expanded hours thereafter. In addition, Part V of the final order requires dealers to state their hours of operation—which will include the expanded hours required by Part III of the order—in any advertising they run for one year.

Part VI of complaint counsel's proposed order would require each respondent to report to the Commission any information it obtains concerning conduct prohibited by the order. This **[38]** provision raises a number of difficult questions of interpretation and enforceability. We need not get to those questions, however, since we disagree with complaint counsel's rationale for including Part VI. Complaint counsel assert that this provision is necessary to detect future agreements on showroom hours. As respondents point out, though, the opening and closing of a dealership is essentially a public act. The Commission will easily enough be able to determine whether dealers are maintaining uniform hours. If this phenomenon is observed, other provisions of the order, together with routine investigative tools, will give the Commission access to information showing whether an illegal agreement underlies the phenomenon. Moreover, should such an agreement be attempted, dealers who wish to remain open will have an incentive to report the violation to the Commission. Under the circumstances, we find that the rather significant burdens of proposed Part VI outweigh its benefits.

Part VII of complaint counsel's proposed order requires the association respondents to keep transcripts of all formal or informal meetings of their membership, committees, and board of directors for five years. In our view, this provision is reasonably related to the unlawful conduct found to have occurred in this case. The minutes of past association meetings provide direct evidence that those meetings were the principal forum for discussion of hours restrictions. *See, e.g.*, IDF 14–16, 22–28. The transcript requirement precludes the possibility that respondents could avoid detection of future discussions simply by sanitizing their association minutes.

We are not persuaded by respondents' argument that proposed Part

the showrooms on Saturdays, so to speak, you would really have to do a lot of promotion"); CX 3809, Cook Tr. 48 ("I think people are just used to the fact that Mondays and Thursday nights are the shopping nights as far as automobile dealerships are concerned"); CX 3819, Genthe Tr. 46 ("The people are educated that we aren't open"); CX 3827, Kelel Tr. 66 ("They have now been cushioned [means "conditioned," *see id.* at 67] over however many years, 10, 12, 15 years or however long it's been to know that you don't buy cars on Saturday").

VII (Part VI of our final order) would interfere with their right to discuss matters in confidence with legal counsel, who typically attend association meetings. Complaint counsel correctly point out that if the Commission were to request a transcript containing privileged information, respondents could simply submit a redacted version and explain their basis for withholding the deleted portions. Respondents do, however, raise a legitimate problem of interpretation with respect to proposed Part VII. They contend that the requirement to transcribe "informal" meetings may apply to association cocktail parties, golf outings, and dinners, or even to a conversation between two dealers on association premises. Obviously, transcribing these kinds of encounters is impractical. We recognize that discussions about showroom hours could take place in these settings, but we think other parts of the order are sufficient to address that possibility. We therefore modify the transcript requirement to apply only to "business" meetings of association membership, boards, or committees.

Part VIII of complaint counsel's proposed order requires the association respondents to amend their bylaws to: (1) eliminate **[39]** any provision inconsistent with the Commission's order; (2) prohibit members from discussing hours of operation at formal or informal meetings; and (3) require expulsion of any member who violates the prohibition on discussing hours of operation.[42] We find these requirements reasonably necessary to prevent further violations, especially since they address the "informal" meetings for which the transcript requirement is impractical. Moreover, there is Commission precedent for requiring an organization to prohibit actions taken by its members outside of the context of association activities and to expel members for violating the prohibitions. *E.g., American Medical Association*, 94 FTC 701, 1032, 1039 (1979), *aff'd*, 638 F.2d 443, 453 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982). Because DADA and the line associations were responsible for coordinating the evening and Saturday closing program, it is appropriate that they should now be responsible for policing the end of the program.

Respondents argue that proposed Part VIII (Part VII of our final order) amounts to censorship because it requires expulsion for merely discussing a forbidden subject. We find no merit in that argument. Discussion of hours of operation necessarily precedes an agreement to

[42] We have made the expulsion requirement somewhat more specific than proposed in complaint counsel's order.

restrict such hours, the conduct found illegal in this case. We have previously observed that speech which constitutes or relates to illegal conduct is not protected by the First Amendment. *Michigan State Medical Society,* 101 FTC 191, 307 (1983). And the Ninth Circuit has held that "any remedy formulated by the FTC that is reasonably necessary to the prevention of future violations does not impinge upon constitutionally protected commercial speech." *Litton Industries, Inc. v. FTC,* 676 F.2d 364, 373 (9th Cir. 1982).[43] **[40]**

Part IX of complaint counsel's proposed order requires the association respondents to provide the Commission with the name and address of any member expelled for violating the bylaws required by the order. Respondents contend that this provision is excessive in light of the other order provisions requiring that information be made available to the Commission. However, we have deleted proposed Part VI, one of the provisions to which they refer, and we find that proposed Part IX would enable the Commission to act quickly to prevent recurrences of the violation found in this case. Thus, we adopt Part IX, which becomes Part VIII of our final order.

Parts X, XI, and XII of complaint counsel's proposed order are boilerplate provisions requiring respondents to give a copy of the order to their employees, to file compliance reports, and to notify the Commission of changes of employment (for individuals) and corporate status (for dealerships and associations). Respondents object only to proposed Part X. They argue that distributing the order to employees in this case would intimidate employees in the exercise of their rights under the labor laws. We doubt Part X would have such an effect. The record shows that dealership employees over the years have been well-versed in their labor law rights. It is unlikely they would be misled into thinking the order regulates legitimate organizing or bargaining

[43] In *National Society of Professional Engineers,* 435 U.S. 679, the Supreme Court rejected the contention that a court order enjoining the Society from adopting any official opinion, policy statement, or guideline stating that competitive bidding is unethical abridged the Society's First Amendment rights. The court observed that the trial court was empowered to fashion appropriate restraints both to avoid a recurrence of the violation and to eliminate its consequences. The court stated:

> While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding. The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade . . . ." *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502. In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations.

Id. at 697–98 (footnote omitted).

activities. Moreover, to the extent that some dealership employees may have participated in the violence and intimidation noted in the record, giving them knowledge that their employers are compelled by the Commission to expand hours may prevent reprisals against the employers. Accordingly, we adopt proposed Parts X, XI, and XII without change as Parts IX, X, and XI of our final order.

We believe the relief outlined above is necessary and appropriate to prohibit DADA and its members from agreeing or joining together to set hours of operation in the Detroit new car market. The order will benefit consumers by allowing market **[41]** forces to determine the optimal amount and arrangement of showroom hours. Dealers will no longer be assured that their competitors will not attempt to appeal to shoppers with more or different hours. Thus, dealers will be forced to consider consumer preferences in setting hours and to restore to consumers the convenience and service that were lost by virtue of the hours limitation.

VI. Conclusion

For the reasons stated above, we hold that respondents have unlawfully restrained trade, in violation of Section 5 of the Federal Trade Commission Act, by agreeing to keep Detroit area new car dealer showrooms closed on Saturday and on Tuesday, Wednesday and Friday evenings. We therefore reverse the ALJ's dismissal of the complaint and order the relief described in the previous section.

Final Order

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to reverse the initial decision and enter the following order. Accordingly,

It is ordered, That for purposes of this order, the following definitions shall apply:

1. "*Person*" means any natural person, corporation, partnership, association, joint venture, trust, or other organization or entity, but not governmental entities.

2. "*Dealer*" means any person who receives on consignment or purchases motor vehicles for sale or lease to the public, and any

director, officer, employee, representative or agent of any such person. **[2]**

3. "*Dealer association*" means any trade, civic, service, or social association whose membership is composed primarily of dealers.

4. "*Detroit area*" means the Detroit, Michigan metropolitan area, comprising Macomb County, Wayne County and Oakland County in the State of Michigan.

5. "*Hours of operation*" means the times during which a dealer is open for business to sell or lease motor vehicles.

6. "*Weekday hours*" means the hours of 9:00 a.m. to 6:00 p.m. Monday through Friday.

7. "*Non-weekday hours*" means hours other than 9:00 a.m. to 6:00 p.m. Monday through Friday.

8. "*Dealership and Individual Respondent*" means any corporation listed in Addendum A to the order, including its officers, directors, representatives, agents, divisions, subsidiaries and successors and assigns, and any individual listed in Addendum B to the order.

9. "*Association Respondent*" means any association listed in Addendum C to the order, the officers, directors, representatives, agents, divisions, subsidiaries, successors and assigns of any listed association, and James Daniel Hayes.

10. "*Respondent*" means any dealership, individual, or association respondent.

I.

It is further ordered, That each respondent shall cease and desist from, directly or indirectly or through any corporate or other device, entering into, continuing, or carrying out any agreement, contract, combination, or conspiracy, in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act), with any other respondent or other dealer or dealer association in the Detroit area to establish, fix, maintain, adopt, or adhere to any hours of operation.

II.

It is further ordered, That each respondent shall cease and desist from, directly or indirectly or through any corporate or other device, performing any of the following acts or practices or encouraging, inducing, or requiring any person to perform any of the following acts

or practices, or entering into, continuing, or carrying out any agreement, contract, combination, [3] or conspiracy with any other person in the Detroit area to do or perform any of the following acts or practices:

A. Exchanging information or communicating with any other respondent or other dealer or dealer association in the Detroit area concerning hours of operation, except to the extent necessary to comply with any order of the Federal Trade Commission, and except, after two (2) years from the date this order becomes final, to the extent necessary to incorporate individual dealers' hours of operation in lawful joint advertisements; or

B. Requesting, recommending, coercing, influencing, inducing, encouraging, or persuading, or attempting to request, recommend, coerce, influence, induce, encourage, or persuade, any other respondent or other dealer or dealer association in the Detroit area to maintain, adopt or adhere to any hours of operation.

III.

It is further ordered, That each dealership and individual respondent shall, commencing thirty (30) days after this order becomes final and continuing for a period of one (1) year, maintain a minimum of sixty-four (64) hours of operation per week for the sale and lease of motor vehicles. Each dealership and individual respondent shall post conspicuously its hours of operation at each of its places of business subject to this order in a manner and location readily visible to the public from outside the dealership's showroom. Each dealership and individual respondent shall conduct its sales operation during any non-weekday hours in all respects in the same manner as during weekday hours, except that the motor vehicle sales force on duty during non-weekday hours may equal in number no less than one-third of the motor vehicle sales force generally on duty during weekday hours.

The requirement of this Part III to maintain minimum weekly hours of operation shall not apply to any individual respondent who does not own or operate any dealership in the Detroit area.

IV.

It is further ordered, That respondent Detroit Auto Dealers Association, Inc. ("DADA") shall:

A. Beginning thirty (30) days after this order becomes final, and for a period of not less than four (4) weeks thereafter, place and cause to be disseminated each week at least four (4) advertisements, including one in the Thursday edition and one in the Saturday edition of the *Detroit News* and one in the Thursday edition and one in the Saturday **[4]** edition of the *Detroit Free Press.* The advertisements shall be devoted exclusively to explaining that dealership and individual respondents are required to offer expanded shopping hours for one year as a result of this order and will be free to continue offering expanded hours thereafter. The advertisements shall be a minimum of one-eighth (⅛) of a page and shall be placed in the same location at which advertisements for the sale of new automobiles ordinarily appear; and

B. Before placing the first such advertisement, DADA shall conduct, or cause to be conducted, copy testing of the advertisement. The copy testing shall be conducted by a reputable advertising or research organization using techniques commonly accepted in the advertising profession. The advertising or research organization shall provide a written report to DADA explaining the results of the copy testing. DADA may use the copy-tested advertisement to satisfy its obligations under this Part IV only if the report establishes that the advertisement effectively communicates: (1) that until [date of order], most Detroit-area automobile dealers have not been open for business on Saturday or on Tuesday, Wednesday, or Friday evening; and (2) that as the result of litigation with the Federal Trade Commission, Detroit-area automobile dealers must offer expanded shopping hours for one year, and are free to choose their own hours thereafter. In the event any subsequent advertisement prepared pursuant to this paragraph differs significantly from the first advertisement disseminated in accordance with this paragraph, DADA shall conduct or cause to be conducted copy testing of the subsequent advertisement in the same manner and for the same purpose as described above.

V.

It is further ordered, That each dealership and individual respondent shall, while Part III of this order is in effect, disclose its hours of operation in all of its advertising, except that such disclosure is not required in advertisements offering for sale a single, particular motor vehicle. In any print advertisements, the disclosure shall be displayed

in a type size at least as large as that in which the principal portion of the text of the advertisement appears, and the disclosure shall be highlighted so that it can be readily noticed. In television advertisements, the disclosure shall be presented in both the audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall occur and the rate of speech shall be the same as for the other parts of the advertisement. **[5]**

VI.

It is further ordered, That each association respondent shall, for a period of five (5) years from the date this order becomes final, cause to be made a notarized stenographic transcription of all business meetings of its membership, board of directors, or committees, and shall retain such transcript for a period of five (5) years from the date of the transcription. Such transcripts shall be provided to the Commission upon request.

VII.

It is further ordered, That each association respondent shall:

A. Within sixty (60) days from the date this order becomes final, amend its bylaws, rules and regulations to eliminate any provision inconsistent with any provision of this order;

B. Within sixty (60) days from the date this order becomes final, amend its bylaws, rules and regulations to incorporate: (1) a provision that prohibits its members from discussing at any formal or informal membership, board of directors, or committee meeting the hours of operation of any dealer, except to the extent necessary to comply with any order of the Federal Trade Commission; and (2) a provision that requires expulsion from membership of any member who violates such prohibition;

C. Within ten (10) days after the amendment of any bylaws, rules or regulations pursuant to this order, furnish a copy of such amended bylaws, rules or regulations to all members, and within ten (10) days of any new member joining association respondent, furnish to such new member a copy of the bylaws, rules and regulations of association respondent; and

D. Within thirty (30) days after receiving information from any

source concerning a potential violation of any bylaw, rule, or regulation required by Part VII.B of this order, investigate the potential violation, record the findings of the investigation, and expel for a period of one (1) year any member who is found to have violated any of the bylaws, rules or regulations required by Part VII.B of this order. **[6]**

VIII.

It is further ordered, That each association respondent shall, for a period of five (5) years from the date this order becomes final, provide to the Commission the name and address of any member expelled pursuant to the requirements of Part VII.D of this order within ten (10) days after such expulsion.

IX.

It is further ordered, That within ten (10) days after the date this order becomes final, each dealership and individual respondent shall provide a copy of the order to each of its employees and each association respondent shall provide a copy of the order to each of its officers, directors, members and employees. For a period of five (5) years from the date this order becomes final, each dealership and individual respondent shall provide a copy of the order to each new employee involved in motor vehicle sales or leasing, and each association respondent shall provide a copy to each new member, within ten (10) days after the date the employee is hired or the new member joins the association respondent.

X.

It is further ordered, That each respondent shall, within ninety (90) days after this order becomes final and annually thereafter for a period of five (5) years, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

XI.

*It is further ordered,*That for a period of five (5) years from the date this order becomes final, each dealership respondent and

association respondent shall notify the Commission at least thirty (30) days prior to any proposed change in corporate status (such as dissolution, assignment, or sale) that results in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in any corporate respondent which may affect compliance obligations arising out of the order. Each individual respondent shall, for five (5) years from the date the order becomes final, promptly notify the Commission of the discontinuance of his present business or employment and of any new affiliation or employment with any dealer or dealer association. Such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the **[7]** respondent is newly engaged, as well as a description of the respondent's duties and responsibilities in connection with the new business or employment.

Commissioner Machol not participating.

ADDENDUM A

Dealership Respondents

Barnett Pontiac-Datsun, Inc.
Jim Causley Pontiac-GMC Truck, Inc.
Jim Fresard Pontiac, Inc.
Red Holman Pontiac-Toyota-GMC Truck Co.
Art Moran Pontiac-GMC, Inc.
Packer Pontiac Co., a Division of the Packer Corp.
Rinke Pontiac-GMC Co.
Bob Shelton Pontiac-GMC, Inc.
Shelton Pontiac-Buick, Inc.
Porterfield Wilson Pontiac-GMC Truck, Inc.
Woody Pontiac Sales, Inc.
Jack Cauley Chevrolet, Inc.
Dexter Chevrolet Co.
Dick Genthe Chevrolet, Inc.
James-Martin Chevrolet, Inc.
Jefferson Chevrolet Co.
Lou LaRiche Chevrolet-Subaru, Inc.
Walt Lazar Chevrolet, Inc.
Mark Chevrolet, Inc.
George Matick Chevrolet, Inc.
Matthews-Hargreaves Chevrolet, Co.
Merollis Chevrolet Sales & Service
Ed Rinke Chevrolet-GMC Co.
Mike Savoie Chevrolet, Inc.
Les Stanford Chevrolet, Inc.
Steward Chevrolet, Inc.
Tennyson Chevrolet, Inc.
Buff Whelan Chevrolet, Inc.
Wink Chevrolet Co. d/b/a Bill Wink Chevrolet/GMC
Greenfield AMC/Jeep-Renault, Inc.
Village AMC/Jeep, Inc.

ADDENDUM A
(Continued)

Armstrong Buick-Opel, Inc.
Jim Carney Buick Co.
Fischer Buick-Subaru, Inc.
Bill Greig Buick-Opel, Inc.
Krajenke Buick Sales, Inc.
Tamaroff Buick-Honda, Inc.
Audette Cadillac, Inc.
Crissman Cadillac, Inc.
Charles Dalgleish Cadillac-Peugeot, Inc.
Dreisbach & Sons Cadillac Co.
Roger Rinke Cadillac Co.
Birmingham Chrysler-Plymouth, Inc.
Lochmoor Chrysler-Plymouth, Inc.
Shelby Oil Company, Inc.
Roseville Chrysler-Plymouth, Inc.
Bill Snethkamp, Inc.
Thompson Chrysler-Plymouth, Inc.
Westborn Chrysler-Plymouth, Inc.
Colonial Dodge, Inc.
Crestwood Dodge, Inc.
Garrity Motor Sales, Inc.
Mt. Clemens Dodge, Inc.
Northwestern Dodge, Inc.
Oakland Dodge, Inc.
Sterling Heights Dodge, Inc.
Van Dyke Dodge, Inc.
Avis Ford, Inc.
Jerry Bielfield Co.
Beverly John Ford
Jack Demmer Ford, Inc.
Gorno Brothers, Inc.
Jerome-Duncan, Inc.
Al Long Ford, Inc.
McDonald Ford Sales, Inc.
Pat Milliken Ford, Inc.
Russ Milne Ford, Inc.
North Brothers Ford, Inc.
Ed Schmid Ford, Inc.
Stark Hickey West, Inc.
Bob Thibodeau, Inc.
Ray Whitfield Ford
Arnold Lincoln-Mercury Co.
Avon Lincoln-Mercury, Inc.
Bob Borst Lincoln-Mercury, Inc.
Crest Lincoln-Mercury Sales, Inc.
Bob Dusseau, Inc.
Stu Evans Lincoln-Mercury, Inc., of Garden City
Stu Evans Lincoln-Mercury, Inc. of Southgate
Hines Park Lincoln-Mercury, Inc.
Krug Lincoln-Mercury, Inc.
McInerney, Inc.
Bob Maxey Lincoln-Mercury Sales, Inc.
PHP d/b/a Park Motor Sales Co.
Star Lincoln-Mercury, Inc.
Charnock Oldsmobile, Inc.
Drummy Oldsmobile, Inc.
Gage Oldsmobile, Inc.

ADDENDUM A
(Continued)

Bill Rowan Oldsmobile, Inc.
Suburban Oldsmobile-Datsun, Inc.
Autobahn Motors, Inc.
McAlister Motors, Inc.
Melton Motors, Inc.
Sterling Motors, Inc.
Wood Motors, Inc.
Pointe Dodge, Inc.

ADDENDUM B

Individual Respondents

W. Robert Allen
Thomas Armstrong
Charles Audette
Frank Audette
Robert F. Barnett
Jerry M. Bielfield
Robert C. Borst
Robert M. Brent
Paul Carrick
John H. Cauley
James F. Causley, Sr.
J. Herbert Charnock
John Cueter
Charles Dalgleish, Jr
Douglas Dalgleish
John E. Demmer
Harry C. Demorest
Al Dittrich
Thomas S. Dreisbach
John L. Drummy, Sr.
Richard J. Duncan
Robert Dusseau
Stewart Evans
Arnold Feuerman
Richard Flannery
John Ford
F. James Fresard
Frank Galeana
James A. Garrity
Richard E. Genthe
James Daniel Hayes
William Hickey
Albert A. Holman
Naiff H. Kelel
George Kolb
Sigmund Krug
Louis H. LaRiche
James P. Large
Walter N. Lazar
W. Desmond McAlister
Martin J. McInerney
George S. Matick, Jr.
Robert Maxey
Kenneth Meade
George Melton
Norman A. Merollis
Zigmund F. Mielnicki
W.B. (Pat) Milliken
Russell H. Milne
Arthur C. Moran
James E. North
James Riehl
Roger J. Rinke
Roland Rinke
William Ritchie
Arthur J. Roshak

ADDENDUM B
(Continued)

William H. Rowan
Myron P. Savoie
Edward F. Schmid
Robert B. Sellers
C.M. (Bud) Shelton
Joseph B. Slatkin
William Snethkamp
Leslie J. Stanford
Gordon L. Stewart
Marvin Tamaroff
James P. Tellier
Harry Tennyson
Raymond R. Tessmer
Robert Thibodeau
Joseph P. Thompson
Anthony J. Viviano
Raymond J. Whitfield
Stanley A. Wilk
Porterfield Wilson
William J. Wink, Jr.
Donald Wood
Woodrow W. Woody
Robert Zankl

ADDENDUM C

Association Respondents

Detroit Auto Dealers Association, Inc.
Tri County Pontiac Dealers Association, Inc.
Greater Detroit Chevrolet Dealers Association, Inc.
Chrysler and Plymouth Dealers Association of Greater Detroit, Inc.
Greater Detroit Dodge Dealers Association, Inc.
Metro Detroit AMC Dealers Association, Inc.
Metro Detroit Buick Dealers Association, Inc.
Metro Detroit Cadillac Dealers Association, Inc.
Metropolitan Detroit Ford Dealers, Inc.
Metropolitan Detroit Oldsmobile Dealers Association, Inc.
Metropolitan Lincoln-Mercury Dealers Association, Inc.
Southeastern Michigan Volkswagen Dealers Association, Inc.
Metropolitan Detroit Chevrolet Dealers Advertising Association, Inc.
Chrysler Plymouth Dealers of Greater Detroit Advertising Association, Inc.
Metro Detroit AMC Advertising Association, Inc.
Ford Dealers Advertising Fund, Inc.
Lincoln-Mercury Dealers Advertising Fund—Detroit District, Inc.
Tri County D.A.A., Inc.