IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

MODIFIED FINAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9189, Final Order, Feb. 22, 1989--Modified Final Order, June 20, 1995

This order modifies an earlier Commission order to require, for one year, that the automobile dealership and dealership owner respondents involved in the proceeding to open their showrooms for a minimum of 64 hours per week, or, at their option, to maintain minimum hours of operation of an average of ten and one half hours per day on weekdays, plus a minimum of eight hours on Saturdays. In addition, the Commission modifies Part VII.D of the final order (111 FTC 417), isued in 1989, by changing from 30 days to 60 days the time period within which the dealership association respondent must investigate and resolve allegations that association members have violatecd by-laws, rules, or regulations affected by the order.

ORDER

This matter has been heard by the Commission on remand from the United States Court of Appeals for the Sixth Circuit and on briefs, proposed findings of fact, affidavits and other materials filed by complaint counsel and by respondents. For the reasons stated in the accompanying opinion, the Commission has determined to modify the final order, issued on February 22, 1989, 111 FTC at 513-521, as set forth below and to issue the modified order with respect to all respondents that remain in the proceeding.

Part III of the order of February 22, 1989, is hereby deleted, and *It is hereby ordered,* That the following is substituted as new Part III:

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, either maintain a minimum of sixty-four (64) hours of operation per week for the sale and lease of motor vehicles, or alternatively, maintain a minimum of an average of ten and a half hours of operation per day during weekdays for the sale and lease of motor vehicles, plus an

additional eight hours of operation on Saturdays 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 showroom of the dealership. 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.

Subpart VII.D of the order of February 22, 1989 is hereby deleted, and it is hereby ordered that the following is substituted as new Subpart VII.D:

D. Within sixty (60) 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.

Chairman Pitofsky and Commissioner Varney not participating.

OPINION OF THE COMMISSION

BY AZCUENAGA, *Commissioner*:

On February 22, 1989, the Commission ordered the Detroit Auto Dealers Association, Inc. ("DADA"), other associations of automobile dealers in the Detroit area, and many dealerships and individuals to cease and desist from agreeing to fix their hours of operation.[1] The respondents appealed, and on January 31, 1992, the

[1] In addition, the order prohibited certain exchanges of information about hours of operation and prohibited the coercion of other dealers to adopt particular hours of operation. The order required the dealership to remain open for a minimum of sixty-four hours of operation per week for a one-year period and contained other provisions to prevent a recurrence of unlawful agreements on hours of business operation.

United States Court of Appeals for the Sixth Circuit "generally" affirmed the Commission, but remanded for the limited purposes of further proceedings as set forth in Section II of the Court of Appeals' opinion and for consideration of two remedial issues.[2] The Supreme Court denied cross petitions for *certiorari* on November 9, 1992.

Subsequently, sixty-one individuals, sixty-eight dealerships, and fifteen dealer associations signed a consent agreement settling the charges.[3] The consent order with these respondents was made final on May 5, 1994. The Detroit Automobile Dealers Association and a former association officer settled on similar terms on July 27, 1994. In addition, the Commission dismissed the complaint against certain individual respondents who died during the course of the litigation and against dealerships that had their franchises terminated and are no longer in business. As a result of the settlements and dismissals, the case remains pending against a total of twenty-seven respondents. Twenty-two respondents, including twelve dealerships and ten individuals, filed a joint brief and evidentiary materials in response to the Commission's Order On Remand.[4]

I. INTRODUCTION

A. Factual Background

The complaint alleged that the Detroit automobile dealers violated Section 5 of the Federal Trade Commission Act by agreeing to close their automobile sales showrooms on Saturday and three weekday evenings. The existence of agreements among dealers to close, orchestrated by the Detroit Auto Dealers Association and the line groups (associations of dealers of a particular automobile brand), is not in dispute at this point in the proceeding.

The agreement to close on Saturdays and three weekday evenings evolved over a fourteen-year period when the automobile dealers in Detroit were resisting union efforts to organize their sales employees. Until 1959, Detroit auto dealerships were open weekday evenings

[2] *Detroit Auto Dealers Association, Inc. v. Federal Trade Commission*, 955 F.2d 457, 472 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992).

[3] In January 1993, the parties filed a joint memorandum requesting that the Commission take no action for forty-five days, pending settlement discussions. On March 17, 1993, after the expiration of that period, the Commission issued an Order On Remand, requesting briefing on certain remand issues. Briefs were filed on August 20, 1993, and Answering Briefs were filed on September 20, 1993.

[4] The other five respondents did not file briefs or any other documents in response to the Commission's Order on Remand.

and Saturdays. IDF ¶ 9.[5] Beginning in June 1959, the Detroit Auto Dealers Association encouraged members to close early two evenings per week. IDF ¶¶ 11-18. When this agreement to close proved successful, in 1961, members of the Association agreed to close early on a third weekday evening. IDF ¶¶19-34. From 1968 to 1971, members of the various line groups agreed to close on Saturdays during the summer months. IDF ¶¶ 38-46. In 1973, the dealers agreed to close year-round on Saturdays. IDF ¶¶ 47-50.[6]

Union organizing drives occurred contemporaneously with the agreements among dealers to reduce hours of operation. Before 1959, most dealers were open a total of 69 hours per week. IDF ¶ 92. Some dealers required the sales staff to work during all hours of operation. IDF ¶ 96. Others used split shifts, but sales employees felt pressure to be present during all hours of business for fear of losing commissions. IDF ¶¶ 98, 101, 120-21.

Both the Teamsters and the Salesmen's Guild of America began organizing campaigns in 1959. Both unions demanded multi-employer bargaining, uniform five-day work weeks, higher commissions, and other concessions. IDF ¶ 125-130. In 1960, the line groups recommended that member dealers adopt minimum employment standards to satisfy many of the demands being made by the unions. 111 FTC at 481. These changes included paid vacations, minimum commissions, shorter work weeks and group insurance. *Id.* This strategy proved to be successful, and by the end of 1960, the Teamsters lost most representation elections. IDF ¶ 145.

By the end of 1960, most dealerships were closed on Wednesday, Friday and Saturday evenings, but the sales employees remained dissatisfied with the length of the work week. IDF ¶¶ 148, 151. In 1966, the Automotive Sales Association ("ASA") began to recruit

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[5] References to the record are abbreviated, as follows:

ID -- Initial Decision
IDF -- Initial Decision Finding
Tr. -- Transcript of Hearing
CX -- Complaint Counsel's Exhibit
RX -- Respondents' Exhibit
RRX -- Respondents' Remand Exhibit
RPF -- Respondents, Proposed Finding
RPSF -- Respondents' Proposed Supplemental Finding

[6] The Commission adopted these findings by the ALJ. *Detroit Auto Dealers Association, Inc.*, 111 FTC 4171 47G-79 (1989), aff'd in part and remanded in part, *Detroit Auto Dealers Association, Inc. v. FTC*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992).

members and demanded evening and Saturday closing as a primary union objective. IDF ¶¶ 152-53. Although the ASA won approximately 81 representation elections, it was not successful in negotiating Saturday closing as part of collective bargaining agreements. IDF ¶¶ 166-69. In 1967, the ASA struck some dealers and picketed some nonunion dealers. IDF ¶¶ 184-86. Threats, assaults, and property damage against dealers occurred during this period. IDF ¶¶ 186-92.

The ASA affiliated with the Teamsters who made uniform Saturday closing the centerpiece of their organizing efforts. IDF ¶¶ 205-206. The dealers discussed the Teamsters' demands at line group meetings and discussed making concessions to achieve labor stability. IDF ¶ 232. The dealers decided that the only way to end the labor strife was to adopt uniform year-round Saturday closing. IDF ¶ 238. Saturday closing was adopted to satisfy the salesmen and avert further unionization. IDF ¶¶ 240-41.

A period of relative labor peace has prevailed since the dealers agreed to adopt uniform Saturday closing in 1973. IDF ¶ 242. Since 1973, however, dealers who have attempted to open on Saturday have been picketed and have suffered vandalism and threats of violence. IDF ¶¶ 245-284. Although the Commission found that some salesmen participated in the picketing, it concluded that "the perpetrators of the threats and vandalism remain unidentified." 111 FTC at 483 (footnote omitted).

B. Commission Proceedings

The Administrative Law Judge ("ALJ") dismissed the complaint, concluding that the non-statutory labor exemption shielded the agreement among dealers to establish uniform hours of operation. 111 FTC at 474-75. The ALJ stated that the exemption depended on the following considerations: whether a labor dispute led to the concerted activity, whether labor concerns were the motivation for the concerted action, and whether its primary effect was on the labor concern. *Id.* at 466. He found that the automobile dealers were motivated by the labor dispute to enter into the agreement and that its primary effect would be on the sales employees, and not the customers, who would suffer comparatively little inconvenience in shopping. *Id.*

The Commission reversed, deciding that the non-statutory labor exemption did not apply to the agreement among dealers. The Commission concluded that the agreement was not part of a labor negotiation, but rather was adopted by employers to forestall unionization of their employees and to head off collective bargaining. 111 FTC at 488. Rejecting the ALJ's motivation test for determining the applicability of the exemption, the Commission observed that such a subjective test would simply invite abuse. Since the employees and the dealers had parallel incentives, the benefit to the employees from reduced hours of operation did not provide a basis for exemption from Section 5. *Id.* at 489.

The Commission found that the respondents did not present any evidence that the agreement among dealers resulted from "arm's length negotiation with their sales employees." 111 FTC at 492 (footnote omitted). It observed that the purpose of the non-statutory labor exemption was to preserve the integrity of the labor negotiation process, and that it would be inconsistent with national labor policy to use the exemption to immunize conduct that was designed to head off collective bargaining. *Id.* Further, the Commission decided that a finding of a Section 5 violation would not upset any carefully negotiated balance of interests between employers and employees.

II. THE REMAND BY THE COURT OF APPEALS

The respondents sought judicial review of the Commission's final order and opinion. On January 31, 1992, the Court of Appeals for the Sixth Circuit remanded the case to the Commission.

A. The Opinion of the Court of Appeals

The Court of Appeals "agreed with the FTC's conclusion generally that the agreement in controversy was not subject to the non-statutory labor exemption," but remanded for consideration whether "this same conclusion applies to the distinct minority of petitioner dealers who entered into collective bargaining agreements . . . ." 955 F2d at 467. The court pointed out that as a factual matter, it was unclear whether these agreements were the result of *bona fide* negotiations. *Id.*

The Administrative Law Judge made findings that seven dealerships entered agreements with their employees. IDF ¶ 288-

299. The Commission opinion dismissed the significance of those agreements, saying that they did not establish "bargained-for" hours, but merely incorporated, by maintenance of standards provisions, the unlawful hours limitations orchestrated by the Detroit Automobile Dealers Association. 111 FTC at 491.

The Court of Appeals, however, indicated that the Commission had failed to deal adequately with the individual collective bargaining agreements. It said that a petitioner "may well be able to claim" the exemption if direct negotiations and collective bargaining brought about "additional or different limits on showroom hours." 955 F.2d at 468. The court said that individual, good faith negotiations between a dealer and the employee union should not be discounted, emphasizing that the important question is "whether *bona fide* bargaining took place" with respect to hours. *Id.*

Recognizing that the agreement to establish uniform showroom hours was among dealers, the court nonetheless found it "material for the FTC to consider whether" the individual dealer-union agreements contained hours restrictions that were the product of "genuine collective bargaining." *Id.* Although the Sixth Circuit agreed with the Commission that the dealers' association could not claim the exemption, it nevertheless directed the Commission to examine dealers individually "with respect to whether some may actually have negotiated with unions or representatives for shorter showroom hours in good faith (or under force and threats of vandalism, violence, picketing and property damage)." *Id.*

The court concluded that the Commission had not adequately analyzed the ALJ's findings of fact and conclusions of law. It directed the Commission on remand to consider the record and findings "regarding any individual dealers who may be entitled to claim an exemption under the circumstances of *bona fide* collective bargaining with a union for shorter showroom hours or as a direct result of union directed violence and force for shorter showroom hours." *Id.* at 468 (emphasis in original, footnote omitted).

B. The Positions of the Parties on the Scope of the Remand

On remand, complaint counsel take the position that none of the dealers is entitled to the protection of the non-statutory labor exemption. The respondents take the opposite position that all are exempt. Complaint counsel's position is consistent with the holding

of the Commission in 1989 that whatever antitrust immunity might attach to individual dealer-employee negotiations does not extend to shield an agreement among dealers. 111 FTC at 492. The Commission is mindful, however, that although the Court of Appeals agreed with the Commission that the non-statutory labor exemption does not shield an agreement among dealers, the court's remand requires us to consider individual claims by dealers that their restrictions on hours of operation were the result of *bona fide* negotiations either with a union or their employees in order to decide whether any individual dealers might be exempt.

The respondents argue that the dealers (apparently meaning all Detroit auto dealers) should be exempt from Section 5 if they acted in response either to union directed violence or to nonviolent, lawful union pressure. Brief of respondents at 91. The respondents argue that in light of national labor policy to encourage unions to use lawful economic pressure, such as strikes, to resolve labor disputes, antitrust immunity should be extended to collective action responsive to such lawful pressure. *Id.* at 91-92.

The respondents further argue that the antitrust exemption should not be limited to those dealers who were the specific targets of union directed violence or force. *Id.* at 94-101. They argue that immunity should extend to any dealer who acted in response to press reports or other reports of union violence. The respondents also argue that there is no reason to require proof of union involvement in specific acts of coercion, as long as some violence was attributable to a union and the dealers perceived the violence to be union directed. *Id.* at 105. We do not so read the opinion of the Court of Appeals.[7]

The court affirmed the Commission's decision that the non-statutory labor exemption does not shield the agreement among dealers to reduce their hours of operation. Indeed, the court explicitly affirmed the Commission's finding that "motivation by labor concerns" is not sufficient to support the exemption. 955 F.2d at 466. The Commission concludes that for purposes of this remand, motivation "by labor concerns" includes motivation based on dealers' subjective perceptions of union violence or threats thereof and,

[7]Under the respondents' interpretation of the non-statutory labor exemption, businesses would be excused from compliance with the antitrust laws if they acted in response to lawful union pressure or in response to their own subjective perception of union violence. This position appears to be a variation of the coercion defense that the respondents unsuccessfully asserted before the Administrative Law Judge and did not pursue on appeal to the Commission or the Court of Appeals. Respondents' Memoranda and Proposed Conclusions of Law, April 21, 1987, at V-43 to V-47, V-100 to V-102.

consistent with the opinion of the court, is not sufficient to justify the exemption.

C. The Scope of the Remand

The Court of Appeals indicated that the remand is for the "limited purposes," set forth in Part II of the opinion. In Part II, the court indicated that it was considering whether the non-statutory labor exemption "applies to the distinct minority of petitioner dealers who entered collective bargaining agreements with unions . . . . " 955 F.2d at 467. This statement suggests that the remand is limited only to those respondents that engaged in formal collective bargaining with their sales employees.[8] This interpretation is supported by the court's subsequent statement that if a petitioner's "direct negotiations and collective bargaining with salesperson employees or their representatives" brought about "additional or different limits on showroom hours," that dealer might be able to claim the protection of the exemption. 955 F.2d at 468.

The respondents, however, argue that the Commission should grant the exemption to any dealer who reduced hours either as a direct result of union directed violence and force or as a result of bargaining for shorter hours. The respondents would not require proof that the hours reduction resulted from *bona fide* bargaining between the dealer and the union or the employees, but would require only a showing that the hours reduction was at least partly motivated by a perception of union violence. The respondents rely heavily on the following sentence of the Court of Appeals, opinion:

> Our remand, then, concerns a requirement that the Commission consider carefully the record and the ALJ findings regarding any individual dealers who may be entitled to claim an exemption under the circumstances of *bona fide* collective bargaining with a union for shorter showroom hours or as a direct result of union directed violence and force for shorter showroom hours. 955 F.2d at 468 (emphasis in original; footnote omitted)

We reject the respondents' position, because the opinion, read as an entirety, indicates that the exemption applies only to dealers who actually engaged in *bona fide* bargaining, either with a union or in response to union directed violence. The sentence immediately

[8] The seven dealerships and four individual respondents found to have engaged in some form of collective bargaining are identified in the Initial Decision. IDF 288-299.

preceding the quoted language states that the Commission should consider individual dealerships "with respect to whether some may actually have negotiated with unions or representatives for shorter showroom hours in good faith (or under force and threats of vandalism, violence, picketing and property damage)." *Id.* This phrasing indicates that the court required either bargaining in good faith or bargaining in response to violence, and not, as the respondents suggest, either bargaining or a perception of violence.

Other statements in the opinion confirm that the Court of Appeals intended that the exemption apply only if the dealers engaged in good faith negotiation with their employees. The court stated: "The important question, as stated by the FTC, is 'whether *bona fide* bargaining took place' with respect to restrictions on hours of operation." *Id.* It continued that "we find it material for the FTC to consider whether separate dealer union agreements existed with unions which 'contained bargained for hours restrictions,' which were the product of genuine bargaining." *Id.* Indeed, the sentence that the respondents emphasize so heavily, quoted above, directs the Commission to consider the record and findings of the ALJ, quoting six of the ALJ's conclusions in a footnote. 955 F.2d at 468 n.9, quoting 111 FTC at 467-68 and n.20. These six conclusions from the ALJ's opinion refer repeatedly to bargaining, to collective bargaining agreements, and to dealers' agreements with their employees. *Id.*

Our reading of the court's opinion that bargaining between the employer and the union or employees is an essential element of the non-statutory labor exemption and that unlawful agreements are not immunized simply because they are a result of union directed violence and force is consistent with the law of this case and established precedent. In *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers,* 325 U.S. 797, 799-800 (1945), the Supreme Court held that the labor exemption did not shield "industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control." Employers and the union entered collective bargaining agreements under which the employers would decline to deal with companies that employed workers who were not members of Local Union No. 3. Without addressing whether those collective bargaining agreements violated the Sherman Act, the Court found that they were only one element in a broader scheme among the manufacturers and contractors to monopolize the New York City market. *Id.* at 809.

Allen Bradley stands for the proposition that even collective bargaining agreements between an employer and union cannot shield an unlawful agreement among employers to restrain trade outside the labor market in question.[9]

Our reading of the Court of Appeals' opinion is supported by the court's specific endorsement of the Commission's analysis of *Mackey v. National Football League,* 543 F.2d 606, 612 (8th cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977), and *McCourt v. California Sports, Inc.,* 600 F.2d 1193 (6th Cir. 1979) (applying the Mackey test). 955 F.2d at 467. Under the Mackey test, the nonstatutory labor exemption is available only if: (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. 434 F.2d at 614. The Commission found that since the hours restriction was not established through *bona fide*, arm's length bargaining between dealers and employees, respondents failed to satisfy the third element of this test. Because the third element was not satisfied, the Commission found no need to consider the other elements of the test. 111 FTC at 488 n.9. Mackey and McCourt require that any agreement immunized under the exemption be the product of good faith bargaining between employer and employees.

Our interpretation of the Court of Appeals' opinion ordering this remand is also consistent with three recent decisions that take a highly expansive view of the non-statutory labor exemption. In *Brown v. Pro Football Inc.*, No. 93-7165, (D.C. Cir. March 21, 1995), the Court of Appeals decided that the exemption protected action by the National Football League taken without the consent of the players after the League and the union had reached impasse in multi-employer bargaining.[10] The court held that the "exemption waives antitrust liability for restraints on competition imposed

[9] *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 106,* 421 U.S. 616 (1975), the Supreme Court held that the non-statutory labor exemption did not shield a collective bargaining agreement between a general contractor and Local 100 under which the general contractor would deal only with mechanical subcontractors that were parties to the general contractor's agreement with the union. Local 100 did not represent the employees of the general contractor, but represented the employees of certain mechanical subcontractors. The agreement eliminated competition in the mechanical subcontracting market from non-union mechanical subcontractors. The Court observed that this restraint had anticompetitive effects that did not follow from elimination of competition over wages and working conditions and was not protected by the nonstatutory labor exemption. 421 U.S. at 625.

[10] Judge Wald wrote a vigorous dissent, arguing that to preserve the bargaining process, the exemption should protect only the bargaining process before impasse. The Commission in deciding the instant case takes no position on the merits of the issue in Brown.

through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." Slip Op. at 27. The court further stated that if the players wanted to seek the protection of the Sherman Act, they may "forego unionization or...decertify their unions." Slip Op. at 28. *See also National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995); *Powell v. National Football League,* 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). In the instant case, the respondent automobile dealers entered into a conspiracy to discourage the unionization of their employees and, thereby, to avoid the bargaining relationship that the non-statutory labor exemption protects. Even the expansive view of the exemption in these court decisions stops at protecting the overall bargaining process and does not extend to employer conspiracies to defeat unionization of their employees.

III. REVIEW OF EVIDENCE REGARDING INDIVIDUAL RESPONDENTS

A. Introduction

As developed above, we conclude that the Court of Appeals directed the Commission to review the record and the ALJ's findings with respect to those dealers who entered collective bargaining agreements with their employees. Although the Court of Appeals remanded for the Commission to consider the hours restraint imposed by the "distinct minority . . . of dealers who entered into collective bargaining agreements with unions representing their sales employees," 955 F.2d at 467, the respondents urge the Commission to review the evidence for all the respondents who participated in the remand proceeding. As set forth below, the Commission has reviewed the record and the findings with respect to all the respondents who participated in the remand proceeding to determine whether the reductions in showroom hours were the result of good faith, arm's length negotiations between the dealers and their employees, whether or not part of formal collective bargaining.[11]

[11] The five respondents who did not participate in the remand have not supplemented the record beyond what was before the Commission in the first instance. The five respondents who did not participate in the remand were not among those identified in the initial decision as having entered a collective bargaining agreement. Because we are not aware of evidence suggesting that they imposed the hours restraint as a result of good faith bargaining with a union or their employees, we conclude that the non-statutory labor exemption does not protect them from liability and that they are subject to Part III of the order.

In addition to reviewing the record and findings developed during the administrative trial, the Court of Appeals stated that "f] urther proof may be presented on this issue, if necessary." 955 F.2d at 468. In light of this directive to permit further proof, the Commission's order on remand invited the parties to proffer evidence and propose supplemental findings of fact. The respondents proffered a number of supplemental affidavits and documents, primarily newspaper clippings, and proposed supplemental findings. Complaint counsel opposed the admission of the supplemental affidavits and other evidentiary material on the ground that it is hearsay (often, double or triple hearsay) and requested the opportunity to conduct discovery and cross-examine the affiants. Complaint Counsel's Answer to Respondents' Brief on Remand at 6.

Although complaint counsel's objections to the introduction of much of the supplemental material appear to be well founded, in the interest of economy we have decided not to remand the matter for supplemental administrative hearings. We assume the truth of the allegations in the affidavits and supplemental materials, but find that they do not provide the evidentiary basis for applying the nonstatutory labor exemption.

B. Thompson Chrysler-Plymouth, Inc., and Joseph P. Thomson

Joseph Thompson was the President and Chief Executive officer of Thompson Chrysler-Plymouth, Inc., from 1960 to 1981. Tr. 1938-40. When Mr. Thompson began his career in Detroit automobile sales, his hours of operation were from 8:30 a.m. until 9:00 p.m. weekdays and until 6:00 p.m. on Saturday. Tr. 1942-43.

On September 14, 1960, Mr. Thompson's dealership began to close its showroom on Wednesday and Saturday evenings at 6:00 p.m. Tr. 1944-45. Thompson and eleven other Chrysler-Plymouth dealers placed a joint advertisement in the Detroit Free Press on September 14, 1960, stating, "[t]he Chrysler Dealers of Greater Detroit have agreed to close their new car showrooms and used car lots" on Wednesday and Saturday evenings at 6:00 p.m. CX 3379, Tr. 1944. Mr. Thompson testified that the sales employees constantly complained about their long hours and that the closings were discussed at the Chrysler-Plymouth line group as a means to satisfy the complaints. Tr. 1944-46. His trial testimony did not refer to any negotiation or collective bargaining with employees or a union about

this reduction of hours. In the early 1960's, the Chrysler-Plymouth dealers in Detroit all began to close early on Friday evenings. Tr. 1951-52. In the mid-1960's, Thompson's dealership and all the other Chrysler-Plymouth dealers began to close early on Tuesday evenings, as well. Tr. 1956.

On June 12, 1969, Thompson Chrysler-Plymouth, Inc., together with twenty-eight other dealers, placed an ad in the Detroit News stating that "a majority" of the Detroit area Chrysler-Plymouth dealers had decided to close on Saturday during the summer months. CX 3306, Tr. 1956-57. Mr. Thompson again testified that this action was in response to requests for shorter hours from the sales staff, but again, he did not testify about any bargaining or negotiation with the employees or a union. Tr. 1957.

On August 14, 1973, Thompson Chrysler-Plymouth executed a collective bargaining agreement with Local 212 of the Teamsters union. RX 1006.[12] The agreement did not explicitly cover the hours of operation, but contained the following "Maintenance of Standards" clause:

> The Employer agrees that conditions of employment relating to direct wages and hours of work as set forth in this Agreement shall be maintained at not less than the highest minimum standards in effect on the effective date of this Agreement. The Employer may, however, change hours of work to conform to local practices characteristic of the industry. Conditions of employment may he improved; however, if modified, upon the request of the Union, the Employer agrees to consult with the Union about the matter. The Employer may, where the Agreement leaves it to its discretion to do so, including by way of illustration, but not by way of limitation, add special incentive programs the Employer considers necessary due to present circumstances, sales contests, special "spiffs" on old inventory, etc., the existence, nature and duration of which shall be determined at the sole discretion of management.

RX 1006T. According to Mr. Thompson, the provision was a compromise. The first and third sentences reflected the union demands, and the second and fourth sentences reflected the dealership's position. Tr. 1962-64. With the exception of a five-year period in the 1980's, the employees of Thompson Chrysler-Plymouth have been covered by a collective bargaining agreement that contains a provision substantially the same as the one quoted above. RRX

[12] Apparently Thompson Chrysler-Plymouth had an agreement with the Automotive Sales Association in 1971. The text of the agreement is not in the record, and the respondents did not offer it as a supplemental exhibit or argue that it constrained hours of operation.

145, RRX 146, RX 1006, RX 1011, RX 1013, RX 1030, RX 1053, RX T1, RX T2.

On December 1, 1973, Thompson Chrysler-Plymouth began to close on Saturday throughout the year, not just during the summer months. Tr. 1966. The full year Saturday closings were discussed at the Chrysler-Plymouth line group meetings. Tr. 1967. Three months earlier, on September 8, 1973, the Chrysler-Plymouth dealers had jointly announced that they would reopen on Saturday after the summer period of Saturday closure. CX-3416. The reversal of this action and the decision by the Chrysler-Plymouth dealers to close year-round on Saturday followed similar actions by other automobile line groups in October and November 1973. IDF ¶ 47-50. Mr. Thompson said that the dealers were trying to give their employees shorter work weeks. Tr. 1966-67. Mr. Thompson did not testify that he bargained with either the Teamsters or his employees about Saturday closing. He did testify that the Chrysler-Plymouth dealers discussed it among themselves at the line group meeting, but the nonstatutory labor exemption does not protect negotiations among employers.

The Administrative Law Judge found that the maintenance of standards clause prevented Thompson from extending his hours of operation. IDF ¶ 288. The ALJ also found that the maintenance of standards was a compromise between the dealer's and union's positions, and that "[t]he restraint also was the product of *bona fide* arm's-length bargaining." IDF ¶ 289. Although the restraint on hours of operation imposed by the collective bargaining agreement was the product of good faith bargaining between Thompson and the Teamsters local, and that provision compelled the dealership to follow the "highest minimum standards" regarding hours of operation, it is important to distinguish that restraint from restraints resulting from the unlawful agreements among dealers to reduce hours of operation.

As developed above, the evidence shows that Thompson Chrysler-Plymouth entered agreements on hour limitations with other members of the Chrysler-Plymouth line group: (1) on September 14, 1960, to close at 6:00 p.m. on Wednesday and Saturday; (2) in the early 1960's, to close at 6:00 p.m. on Friday; (3) in the mid-1960's, to close at 6:00 pm on Tuesday; and (4) in June 1969, to close on Saturday during the summer months. These agreements among

dealers cannot retroactively be rendered lawful by the subsequent inclusion of a maintenance of standards clause in a labor contract.

In December 1973, four months after Thompson signed the collective bargaining agreement, dated August 14, 1973, with Teamsters Local 212, Thompson and the other Chrysler-Plymouth dealers agreed to close on Saturdays throughout the year. IDF ¶ 50. Thompson's collective bargaining agreement was for a three-year period, expiring on August 13, 1976. RX 1006W. Mr. Thompson's trial testimony and the supplemental affidavits do not provide a basis for finding that the year-round Saturday closings were the product of negotiations with the union or the sales employees. If the Thompson dealership had been willing to make such a concession to the union or the employees, the appropriate terms could have been included in the August collective bargaining agreement. Thompson did not strike such a bargain with the union or his employees but, rather, entered into that agreement only with his competitors.

Indeed, absent the unlawful agreement among dealers, it is unclear that the bargaining agreement would restrict the hours of operation. The maintenance of standards clause provides that Thompson Chrysler-Plymouth may change its hours of operation to "conform to local practices characteristic of the industry." RX 1006. This language seems to suggest that Thompson may stay open if the other dealers are open. The agreements among dealers, however, established the "local practices characteristic of the industry" in Detroit. Absent the agreement among dealers, the "local practice" in Detroit might differ considerably from the local practices that evolved through their unlawful agreements.

Mr. Joseph Thompson's supplemental affidavit states that he was "aware generally" of the history of union force and violence in Detroit. RRX 145 at 3. His affidavit states that in setting hours of operation, "I followed the hours in effect at most Detroit area retail automobile dealerships at the time. I did so in part because of fear of union force and violence . . . . " *Id.* at 6. Assuming this to be true, it is not a sufficient basis or the non-statutory labor exemption. As developed in Section II.C above, some collective bargaining or negotiation with the union or the employees is required to support the exemption. Even if the courts were to expand the non-statutory labor exemption to include an exemption for actions coerced by union violence, which they have not, a general awareness of the possibility

of union violence would likely be too thin a basis for a claim of coercion.

In sum, whether or not any restraint imposed by the maintenance of standards clause of Thompson Chrysler-Plymouth's August 14, 1973, collective bargaining agreement is exempt from antitrust scrutiny, we conclude that the bargaining agreement does not provide retroactive immunity to the unlawful agreements among Chrysler-Plymouth dealers in the 1960's to reduce evening hours of operation and does not prospectively extend immunity to the December 1973 agreement among dealers to reduce Saturday hours during the full year, not just the summer months.

Although the nonstatutory labor exemption does not apply to the original decision to reduce hours, Mr. Thompson and his dealership subsequently, in good faith, negotiated bargaining agreements on the basis of expectations arising from the maintenance of standards provision, and these subsequent agreements between the employees and the Thompson respondents do provide a basis for the exemption. *See* RRX 147 at 22; RRX 148 at 24. As the original Commission opinion indicated, the finding that the agreement among dealers was unlawful does not "affect expectations that a settlement negotiated in the future -- whether through formal, multi-employer collective bargaining or at arm's length talks at individual dealerships -- would be protected from antitrust sanctions." 111 FTC at 492. Accordingly, we conclude that Part III of the order will not require Mr. Thompson or Thompson Chrysler-Plymouth, Inc., to remain open beyond the provisions of the current labor contract, provided there continues in effect a collective bargaining agreement containing a maintenance of standards provision like that in effect from September 14, 1989, through March 31, 1994, or that otherwise provides a basis for the exemption.[13]

C. Crestwood Dodge, Inc.

Mr. George Beals operated Crestwood Dodge, Inc., from October 1967 to March 1972. RX 3442. At the time Beals took over, the hours of operation were from 8:30 a.m. to 6:00 p.m. on Tuesday,

[13] Mr. Thompson, in his remand affidavit of August 20, 1993, stated that the dealership was subject to a collective bargaining agreement, dated October 1, 1992, and that the agreement contained a maintenance of standards provision that limited his authority to extend hours of operation. RRX 146 and RRX 148 at 24. That agreement expired on March 31, 1994, according to the affidavit. RRX 146 at 10. To the extent that no such agreement presently exists, Part III of the order applies to Mr. Thompson and Thompson Chrysler-Plymouth, Inc.

Wednesday, Friday and Saturday and from 8:30 a.m. until 9:00 p.m. on Monday and Thursday, and he continued those hours. RX 3442E. Mr. Alfred Dittrich operated Crestwood Dodge, Inc., from October 1, 1973, until approximately April 1976. RRX 138 at 1, Tr. 31606

In October 1967, Crestwood Dodge, Inc., signed a collective agreement with the Automotive Sales Association. RX 1300.[14] That agreement did not specify the hours of operation or contain a maintenance of standards clause. *Id.* The agreement expired in 1970. RX 3442G. In 1970-1971, Crestwood Dodge negotiated a second three-year collective bargaining agreement with ASA. RX 3442H. Although the text of the second agreement is not in the record, Mr. Beals' affidavit states that it was similar to RX 2991, which is a bargaining agreement between Suburban Motors Co. and the ASA containing specified hours of operation. *Id.* The Suburban agreement specified that the hours of operation were to be 8:30 a.m. to 9:00 p.m. on Monday and Thursday and 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday, Friday and Saturday. RX 2991 at Z8. According to Mr. Beals' affidavit, under the bargaining agreement, he "could not increase Crestwood's hours of operation during the term of the agreement, unless the ASA consented to such a change." RX 3442H.

On June 13, 1969, the Detroit area "Dodge Boys" ran an advertisement in the Detroit News stating that "practically all" the Detroit area Dodge dealers would close on Saturday. CX 3307. According to Mr. Beals' affidavit, 1969 was the first year that Crestwood and other Dodge dealers closed on Saturday during the summer months, and the Dodge dealers placed a joint advertisement announcing the closing. RX 3442F. A union was then attempting to organize automobile sales employees, and Mr. Beals discussed the proposed closing with the other Dodge dealers as a response to labor demands. RX 3442G. He said that "my understanding at the time was that most of the other Dodge dealers closed their dealerships for the same reasons." RX 3442G.[15]

Mr. Beals' affidavit indicates that in June 1969, he made the decision to close the dealership on Saturday during the summer months. That decision was made after discussions with the other

[14] RX 1300 may not be the full text of the bargaining agreement, but it appears to be all that remains available. RX 3442E.

[15] Minutes of meetings of the Greater Detroit Dodge Dealers Association, Inc., at which Crestwood representatives were present, reflect that the association concurred in proposals for summertime Saturday closing when that issue was discussed at meetings of the Detroit Auto Dealers Association. CX 606B, CX 615A.

Dodge dealers and with the understanding that the other dealers would also close on Saturday. The decision was collectively announced in an advertisement by the Dodge dealers association. At the time of this agreement among the Dodge dealers, Crestwood had a collective bargaining agreement with the ASA, but that bargaining agreement did not contain any restriction on the hours of operation. RX 1300. In his affidavit, Mr. Beals does not claim that he negotiated with the union regarding the decision made in 1969 to close on Saturdays during the summer.

On November 13, 1973, the members of the Greater Detroit Dodge Dealers Association, Inc., including Mr. Dittrich for Crestwood, met and voted to prepare a notice to the media that they would close on Saturdays year-round, beginning on December 1, 1973. CXG22B. This vote followed a report to the meeting that "essentially all the line groups" had decided to close on Saturday beginning on December 1, 1973. *Id.* On November 30, 1973, the "Dodge Boys" placed an advertisement in the Detroit News that their showrooms would be closed on Saturday as of December 1, 1973, listing the names of twenty participating Dodge dealers, including Crestwood Dodge, Inc. CX 3357.

When Mr. Dittrich took control of Crestwood Dodge in October 1973, the union contract negotiated by Mr. Beals was still in effect. According to Mr. Beals' affidavit, he negotiated the bargaining agreement in late 1970 or early 1971, and the agreement was for a three-year term. RX 3442G, H. We, therefore, assume that the agreement would have expired in late 1973 or early 1974. According to Mr. Beals' recollection, as discussed above, the bargaining agreement set forth the hours of operation, including hours of operation from 8:30 a.m. until 6:00 p.m. on Saturday.[16] In November 1973, Mr. Dittrich attended the Dodge line group meeting at which the members voted to announce their closing every Saturday beginning on December 1, 1973. Crestwood Dodge, Inc., participated in the advertisement announcing this reduction of hours.

Mr. Dittrich testified that shortly after he took over Crestwood Dodge, the union steward, Nicola Shelly, told him, "You know we're going to close Saturdays in a few weeks." Tr. 3166. Dittrich said that this was a "shocker for me," and that "I understood her to be telling

[16] Since this collective bargaining agreement did not provide for elimination of Saturday sales hours, the anticompetitive effects of the agreement among dealers to reduce Saturday hours cannot be attributed to the collective bargaining agreement.

me that all the dealerships were going to close on Saturdays shortly." *Id.* At that time, Dittrich had not attended any line group meetings and was unaware of any plan to close all dealerships on Saturdays.

Although Mr. Dittrich testified that he first learned of the plan to close on Saturday from the union steward, he did not testify or even suggest that he bargained with the union for this reduction in hours of operation. His testimony was that Ms. Shelly informed him that "all dealerships" were going to close on Saturday. Whether he first learned about the conspiracy among dealers from the union steward or at the Dodge line group meeting does not change the fact that Mr. Dittrich apparently decided to join an agreement among dealers to close on Saturday throughout the year, and he did not reach that decision through negotiation with his employees. Because the reduction in hours was the result of an agreement among dealers, not a good faith negotiation with employees, the non-statutory labor exemption does not apply.

Both Mr. Beals and Mr. Dittrich submitted affidavits containing precisely the same language as Mr. Thompson's affidavit, namely that "[i]n establishing the Dealership's showroom hours during this period, I followed the hours in effect at most Detroit area retail automobile dealerships at the time. I did so in part because of fear of union force and violence . . . ." RRX 138 at 4 (Dittrich), RRX 144 at 5 (Beals). Mr. Dittrich was more precise about the union threat that persuaded him to close: "I closed the Dealership on Saturdays year-round in late 1973 because of fear of union directed force and violence, namely, because of the certainty that Crestwood would be struck if the Dealership attempted to stay open." RRX 138 at ¶ 10. This general assertion is not sufficient to support an exemption from Section 5 for the reasons stated above.

The supplemental materials do not show that Crestwood currently operates under a collective bargaining agreement or other negotiated agreement on hours of operation with its employees. Part III of the order, therefore, applies to Crestwood Dodge.

D. Bob Borst Lincoln-Mercury Sales, Inc., and Robert C. Borst

Robert C. Borst is the majority shareholder of Bob Borst Lincoln-Mercury Sales, Inc., which has been in business since 1961. Its current hours of operation are from 7:30 a.m. to 9:00 p.m. on Monday and Thursday and 7:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and

Friday. RRX 139 at 1. Robert Borst has represented Bob Borst Lincoln-Mercury Sales, Inc., at Detroit Automobile Dealers Association meetings since 1961. RRX 139 at 1.

Robert Borst closed his dealership on weekday evenings "at or around the same time most of the other dealers" also closed. RPF ¶ 1634. Before reducing his hours of operation, Mr. Borst discussed uniform hours reductions with other dealers and in some instances, the effective dates for the hours reductions. RPF ¶ 1635. In 1966, the Lincoln-Mercury line group agreed to close on Tuesday evenings. CX-172. In 1969, the Lincoln-Mercury dealers agreed to close on Saturdays for the summer months. *See* CX-51. In May 1972, and May 1973, the Lincoln-Mercury dealers placed joint newspaper advertisements stating that "all Detroit area Lincoln-Mercury dealers" would close on Saturday for the summer months. CX-3336, CX-3340. In late 1973, a time when Robert Borst was the President of the Metropolitan Lincoln-Mercury Dealers Association, the line group placed an advertisement in the Detroit Free Press stating that Lincoln-Mercury dealers would close on Saturday. CX-3353, CX-2935-C.

The respondents' Proposed Findings of Fact were filed with the Administrative Law Judge on April 21, 1987. In addition to general findings, they include proposed findings with respect to each respondent. The respondents proposed eight findings relating to Bob Borst Lincoln-Mercury Sales, Inc., and Robert C. Borst. RPF ¶¶ 1632-39. Respondents' Proposed Finding ¶ 1636 states that "Borst's reasons for closing his dealership's showroom on certain evenings and Saturday in the summer and then year-round and his reasons for maintaining his current hours were and are": (1) to respond to demands by and on behalf of employees; (2) to avoid unionization; (3) because too few sales were made to justify remaining open; and (4) to reduce energy consumption following the oil embargo. RPF ¶ 1636. None of the eight proposed findings relate to bargaining between Borst and a union or his employees, and none suggests that Borst reduced hours out of fear of union violence. RPF ¶¶ 1632-39.

On this remand, Mr. Borst submitted a supplemental affidavit consisting first of an approximately ten page recital of his recollection of incidents of union force and violence in Detroit. RRX 139. With the exception of one incident that had nothing to do with hours of operation and that occurred in 1948 (thirteen years before Bob Borst Lincoln-Mercury was founded), when Borst was working

at Burt Baker Used Cars, Mr. Borst's recollections appear to be of events that happened to other auto dealers. Respondents' Proposed Supplemental Findings of Fact with respect to Bob Borst Lincoln-Mercury recite that Mr. Borst "was aware of" the various incidents of violence and intimidation and that he "kept abreast of" published news reports about the retail automobile sales business in Detroit. RPSF ¶¶ 49-57.

Robert Borst's and Bob Borst Lincoln-Mercury's claim under the non-statutory labor exemption rests on the assertion that in setting the hours of operation, Robert Borst "followed" the hours in effect at other dealerships and "did so primarily because of fear of union force and violence . . . ." RRX 139 at ¶ 36. Mr. Borst's affidavit on remand does not refer to the four reasons for closing his dealership that were stated in the 1987 proposed finding of fact, RPF ¶ 1636, or offer any explanation why the 1987 proposed findings failed to refer to the fear of union force and violence as a reason for reducing hours of operation. RRX 139. Mr. Borst's affidavit also claims that although he was opposed to closing on Saturday, he "had to close in light of union violence, union threats, property damage and to preserve my family's safety." RRX 139 at ¶ 40.[17]

Mr. Borst's claim of exemption appears to be based on his subjective perception of union directed violence. Given the apparent inconsistency in the reasons for closing offered in respondents Proposed Findings and the supplemental affidavit, a full hearing would be required to make findings on his perceptions and fears. Such a hearing is unnecessary because, as developed above, proof of *bona fide* arm's length negotiations between the employer and his employees or the union regarding hours of operation is a prerequisite to establishing a claim based on the non-statutory labor exemption. Whatever Mr. Borst's perceptions or recollections, there is no evidentiary basis to support a finding that his reductions in showroom hours were the product of *bona fide* negotiations with his employees or any union.

Since the supplemental materials do not state that Bob Borst Lincoln-Mercury currently operates under a collective bargaining agreement with a union or an agreement with its employees relating

[17] Mr. Borst's remand affidavit, which does not identify a particular event that caused him to close on Saturday at the time he did so, describes incidents of alleged union violence from 1947 on and states that Mr. Borst was "always aware" of the employees' desire for a five-day work week.

to hours of operation, Part III of the order applies to these respondents.

E. Bob Dusseau Lincoln-Mercury and Robert F. Dusseau

In 1955, Bob Dusseau started Bob Dusseau Lincoln-Mercury as President and, since that time, has been the majority shareholder in the business. RPF ¶ 1717. He was a member of the Metropolitan Lincoln-Mercury Dealers Association and was president of the association in 1970-1971. RPSF ¶ 4. When it opened for business, Bob Dusseau Lincoln-Mercury was open from 7:30 a.m. to 9:00 p.m. weekdays and 7:30 a.m. to 6:00 p.m. on Saturday. Its current hours are 8:30 a.m. to 9:00 p.m. on Monday and Thursday and 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and Friday. RPSF ¶ 2.

Dusseau closed his dealership during evening hours and on Saturdays at or around the same time that most other Detroit auto dealers did so. RPF ¶ 1722. In 1966, the Lincoln-Mercury line group agreed to close on Tuesday evenings. CX 172. In 1969, the Lincoln-Mercury dealers agreed to close on Saturdays during the summer months. CX 51. On May 26, 1972, and May 24, 1973, the Lincoln-Mercury line group placed advertisements in Detroit newspapers indicating that all Lincoln-Mercury dealers would close on Saturday for the summer months. CX 3336, CX 3340. Later in 1973, the Lincoln-Mercury line group placed an advertisement that they would close on Saturday during the remainder of the year. CX 3353.

The respondents' Proposed Findings of Fact, filed on April 21, 1987, include ten specific findings related to Bob Dusseau Lincoln-Mercury, Inc., and Robert F. Dusseau. RPF ¶¶ 1717-26. Respondents' Proposed Finding ¶ 1723 states that Dusseau's "reasons for closing his dealership's showroom on certain evenings and Saturdays during the summer and then year round and his reasons for maintaining his current hours were and are": (1) to respond to demands by employees, (2) to avoid unionization, (3) because too few sales were made to justify remaining open, and (4) to reduce energy consumption following the oil embargo. RPF ¶ 1723. None of the ten proposed findings relate to bargaining between Dusseau and a union or the employees, and none indicate that Dusseau reduced hours out of fear of union violence. RPF ¶¶ 1717-26.

Like Mr. Borst, Mr. Dusseau submitted a supplemental affidavit consisting first of an approximately ten page recital of his

recollections of incidents of union force and violence in Detroit from 1947 on. RRX 140. Mr. Dusseau describes one incident he found intimidating in which "two union goons" came to his showroom to talk with salesmen and refused to leave until after he called the police and the police arrived and threatened to arrest them. RRX 140, ¶ 8. With the exception of this single, albeit unfortunate incident, Mr. Dusseau's recollections are of events that happened to others. The proposed Supplemental Findings of Fact recite that Mr. Dusseau "was aware of " various incidents of violence and that he "kept abreast of" press reports on labor relations in Detroit. RPSF ¶¶ 66-71.

Like Mr. Borst, Mr. Dusseau's claim under the non-statutory labor exemption rests on the assertion that in setting the hours of operation at his dealership, he "followed" the hours in effect at most other dealerships and "did so primarily because of fear of union force and violence . . . ." RRX 140 at ¶ 35. Mr. Dusseau's perceptions regarding any incidents of labor strife, even assuming that those perceptions are based on fact, do not support his claim of exemption, because they do not bear on any employer-employee or employer-union bargaining.

As developed above, proof of *bona fide* negotiations between the employer and a labor union or the employees is necessary to establish a claim under the non-statutory labor exemption. Evidence of Mr. Dusseau's motivation or perception alone is not sufficient to support a finding that the reductions in showroom hours were protected by the non-statutory labor exemption. There is no indication of a current collective bargaining agreement relating to hours of operation between this dealership and a union or the employees. Part III of the order, therefore, applies to Mr. Dusseau and to Bob Dusseau Lincoln-Mercury.

F. Bob Maxey Lincoln-Mercury Sales, Inc. and Robert Maxey

Robert Maxey is and has been the President and owner of Bob Maxey Lincoln-Mercury since 1972. RPSF ¶ 78. Bob Maxey Lincoln-Mercury Sales, Inc., has been a member of the Lincoln-Mercury dealers association since 1972. CX 2962. The dealership's hours of operation are from 8:30 a.m. to 9:00 p.m. on Monday and Thursday and from 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and Friday. RRX 141 at ¶ 2.

In May 1972, the Lincoln-Mercury line group ran a newspaper advertisement stating that all Lincoln-Mercury dealers would be

closed on Saturdays during the summer. CX 3336. In May 1973, the line group ran another advertisement announcing Saturday closing for the summer. CX 3340. In September 1973, the line group ran an advertisement announcing that the Lincoln-Mercury dealers were again opening on Saturday, and Bob Maxey Lincoln-Mercury was specifically listed in the advertisement. CX 3422. In November 1973, the group ran an advertisement announcing the full year Saturday closing. CX 3353.

The respondents filed Proposed Findings of Fact on April 21, 1987, including six findings dealing specifically with Bob Maxey Lincoln-Mercury and Robert Maxey. RPF ¶¶ 1673-79. We find nothing in the record that the sales employees of this dealership have ever been unionized. RRX 141. Proposed Finding ¶ 1675 recites that before Mr. Maxey opened his Lincoln-Mercury dealership, he was sales manager at Al Long, Inc., in 1968, during a violent strike by the ASA. The proposed findings state that Maxey closed on Saturday when the other dealers did so to avoid the union, to obtain labor peace, and to conserve energy and that further sales on Saturday were "too poor to justify being open." RPF ¶ 1676.

Like the affidavits of Messrs. Dusseau and Borst, Mr. Maxey submitted a supplemental affidavit containing a lengthy statement of recollections of incidents of union violence that occurred to others. RRX 141. Mr. Maxey's affidavit describes the 1968 strike at Al Long Ford. RRX 141 at ¶ 17. Apparently Mr. Maxey's extensive recollections of labor unrest through the 1960's did not persuade him to close on Saturday because his affidavit recites that he was opposed to closing on Saturday until 1973. RRX 141 ¶ 26. In 1973, he "started receiving startling phone calls. Once they had threatened to blow up my house, at that point I had enough. . . . " RRX 141 at ¶ 26. The affidavit provides no other information about the phone calls and no indication about the identity of the callers beyond the word "they."

Robert Maxey's claim of exemption under the non-statutory labor exemption rests on the claim that he "followed" the hours in effect at most other dealerships "primarily because of fear of union force and violence . . . . " RRX 141 at ¶ 37. Like Messrs. Borst and Dusseau, Mr. Maxey bases his claim for the non-statutory exemption primarily on his perception of union violence. The primary difference between his claim and the claims of Messrs. Borst and Dusseau is the cryptic reference to "startling phone calls" and a threat from an unidentified source. Although startling or threatening phone calls are unfortunate,

we do not understand the respondents to be urging a coercion defense,[18] and as explained above, the non-statutory labor exemption requires proof of *bona fide* arm's length negotiations between employer and the employees or a union. Neither the original proposed findings with respect to Mr. Maxey and his dealership nor the supplemental materials filed on remand support a finding that the reduction in showroom hours was a product of negotiations with his employees or a union. We conclude that the non-statutory labor exemption does not apply to these respondents. In addition, there is no indication that Bob Maxey Lincoln-Mercury is currently party to a collective bargaining agreement with an hours provision or a maintenance of standards clause. Part III of the order, therefore, applies to Mr. Maxey and Bob Maxey Lincoln-Mercury.

G. Crest Lincoln-Mercury Sales, Inc., and William R. Ritchie

Mr. William Ritchie is the President and owner of Crest Lincoln-Mercury Sales, Inc., and was president and sales manager from 1968 to 1972. Tr. 1286-87, 1295-96. He acquired an ownership interest after 1972. Tr. 1303. When Mr. Ritchie took over the dealership in 1968, the showroom hours of operation were 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday, Friday and Saturday and 8:30 a.m. to 9:00 p.m. on Monday and Thursday. Tr. 1305.

When Mr. Ritchie took over Crest, the parts department employees and the mechanics were unionized. Tr. 1296. In 1971, the union struck his dealership. Tr. 1299. Mr. Ritchie testified that the 1971 strike involved violence. He said that he was run off the road "by a couple of cars" when driving home one night. Tr. 1303. The porch of a next door neighbor's house was bombed, and according to Ritchie, the police thought that his house had been the intended target. Tr. 1404. His family was threatened. Tr. 1304-04. Mr. Ritchie resolved the strike by telling the striking workers that he was going to reopen the dealership with replacement workers, and he made no concessions to resolve the strike. Tr. 1301. Ultimately, the striking employees returned to work. *Id.*

Mr. Ritchie testified that his sales employees continued to demand shorter working hours. He initially tried to shorten Saturday hours by opening one hour later and closing two hours earlier than on

[18] *See* Note 7, *supra* and accompanying text.

weekdays, but that did not satisfy his sales people. Tr. 1312. Mr. Ritchie testified that, in the late 1960's or early 1970's, he decided to close his showroom on Saturday in the summer in response to demands by the employees. Tr. 1313-14. Mr. Ritchie testified that other competing dealers closed on Saturday at the same time and that he had discussed the summer Saturday closing with his competitors. Tr. 1314-15. He said that the employees' demand was for uniform Saturday closing during the summer by all dealers, and his discussions with other dealers were in response to this demand for uniformity. Tr. 1315. Ritchie said that he did not simply close his dealership unilaterally, because that "is not what [the employees] wanted." He added: "They wanted the city closed. They wanted all dealerships closed." Tr. 1315. Mr. Ritchie said that he discussed with his sales employees the possibility of his unilaterally closing his dealership on Saturdays, but they did not think that he "was working for their better interest if I couldn't help them influence other dealerships to close." Tr. 1316. Mr. Ritchie testified that he did not want to see other dealers picketed because he wanted to avoid multi-employer bargaining (Tr. 1316), an arrangement by which "an authorized representative of a certain group of employees bargain [sic] for that whole industry." Tr. 1323. Multi-employer bargaining was a consistent demand by the ASA. ID ¶ 157.

Mr. Ritchie testified that, at the end of the summer, about three weeks before the dealership was to reopen on Saturdays for the winter, his employees began to demand that the Saturday closings be extended to be effective year-round. Tr. 1317-18. Mr. Ritchie opposed this and entered into a "dialogue" with his sales force over that demand. Tr. 1318. Nonetheless, the dealership reopened on Saturdays, and Mr. Ritchie testified that this resulted in his employees' "[t]otal dissatisfaction" and a "morale problem." *Id.* Mr. Ritchie stated that, in about 1971, he began closing on Saturdays year-round, but that he would not have eliminated Saturday operations year-round except for the demands of his sales force. Tr. 1319. He further testified that his concerns when making the decision to close were the same as those he had when he conceded to his employees' demands to close on Saturdays during the summer. *Id.*

Mr. Ritchie testified that he discussed his concerns about union activity with other dealers in Detroit, and other dealers shared the same concerns. Tr. 1317. He said that the discussions occurred at

line group meetings, association meetings and social functions. Tr. 1320. At the line group meetings, Mr. Ritchie opposed making concessions to employees on a dealer-by-dealer basis because "[w]e were going to get nothing but run our expenses up." Tr. 1325. He also expressed the view that uniform shorter hours would avoid unionization and bring labor peace. Tr. 1325-26.

Mr. Ritchie was a member of the Board of Directors of the Detroit Automobile Dealers Association from 1972 to 1976. Tr. 1351. He was also president of the Association. *Id.* When he was a director, the DADA Board discussed uniform hours of showroom operations. Tr. 1353. Mr. Ritchie said that he tried to persuade other dealers to close on Saturdays. Tr. 1354.

Mr. Ritchie testified in his supplemental affidavit that he tried to "appease my employees over the years" (RRX 142 ¶ 22), and that he made the "concession [to close on Saturdays] only after long negotiation with my employees" (RXX-142 ¶ 24), who demanded short hours not just for themselves, but for all Detroit dealerships. RXX 142 ¶ 23.

As a DADA board member and president, Mr. Ritchie played a lead role as an organizer with the dealers, and he adamantly opposed negotiations between individual dealers and their employees or their union. He testified that he opposed any dealer-by-dealer, unilateral concessions because that would merely "run our expenses up." He was concerned that piecemeal, unilateral concessions by individual dealers might lead to multi-employer bargaining and believed that any concessions to the unions or their members "absolutely had to be uniform." In addition, Mr. Ritchie's supplemental affidavit indicates that he would not have reduced hours absent the demands of the workforce and "my fear of union directed violence." RRX 142 ¶ 22.

Had Mr. Ritchie closed the dealership on Saturday as a direct result of negotiations with employees, his action would have been protected by the non-statutory labor exemption. This, however, was not the case. We conclude that Mr. Ritchie's closure of his dealership was not the product of an agreement with his employees but was the product of his conspiracy with the other competing dealers.

Put somewhat differently, whatever discussions occurred between Mr. Ritchie and his employees, they did not result in an agreement negotiated in good faith for Crest Lincoln-Mercury unilaterally to limit hours or to close on Saturdays. Indeed, according to the respondent, such an agreement on the part of the dealership would

not have been satisfactory to the employees. The agreement reached on this subject was the product of negotiation, but the negotiation was among the employers, not between the employers and their employees or representatives of their employees. There also is no claim that the dealership operates under any other bargaining agreement with an hours or maintenance of standards provision. We conclude, therefore, that the non-statutory labor exemption does not apply to these respondents, and that Part III of the order properly should apply to Mr. Ritchie and Crest Lincoln-Mercury Sales, Inc.

H. Stewart Chevrolet, Inc., and Gordon Stewart

Gordon Stewart was the dealer-operator of Stewart Chevrolet, Inc., from 1980 through 1983. Tr. 3433. He owns a company that retains a controlling interest in Stewart Chevrolet, but Mr. Melavid has been the dealer-operator since 1983. Tr. 3433. When Mr. Stewart first opened Stewart Chevrolet in October 1980, he opened from 8:30 a.m. to 9:00 p.m. on Monday and Thursday and 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and Friday, which were the hours of operation adopted by the previous owner of the franchise. Tr. 3452.

Although Mr. Stewart became a Detroit automobile dealer after the agreed upon hours of operation had been firmly established for a number of years, he participated in many decisions by the Chevrolet line group to open or close on specific days. For example, the minutes of the March 17, 1982, Greater Detroit Chevrolet Dealers Association, at which he was present, reflect an agreement to open on the evenings of March 29, 30 and 31 because of the end of a rebate program. CX-361. The record contains a number of similar examples of collective decisions by the Detroit area Chevrolet dealers, including Mr. Stewart, to open or close on specific dates, such as the day preceding or following a major holiday. CX-362, CX-363, CX-364, CX-365, CX-370, CX-371.

The record does not reflect that the sales employees at Stewart Chevrolet were unionized or that Mr. Stewart ever negotiated a collective bargaining agreement with a union relating to the hours of operation of Stewart Chevrolet. Indeed, Mr. Stewart's testimony indicates a distaste for dealing with a union. When he purchased the dealership, the mechanics were unionized, and he did not want to purchase it until he received an assurance that he had a 95 percent

chance of eliminating the union after the transaction. Tr. 3450. In 1985, after the Commission initiated this proceeding, Teamsters Local 376 attempted to organize the sales employees at Stewart Chevrolet but were unsuccessful. Tr. 3458-59.

Mr. Stewart's supplemental affidavit recites his "awareness" of and recollection of incidents of union force and violence in the retail automobile business in Detroit. Most incidents discussed in the affidavit allegedly happened to other dealers during the 1960's and 1970's, although Mr. Stewart worked at Merollis Chevrolet during a violent strike. RRX 133 ¶ 20. Once when Mr. Stewart held a special sale on Saturday, a salesman from Dexter Chevrolet identified himself and told him that his business would suffer if he opened regularly on Saturday. Tr. 3455.

As discussed above, the nonstatutory labor exemption applies only to restraints arising from good faith, arm's length negotiation between an employer and his employees or their union, and there appears to be no basis on which to find that Stewart Chevrolet's hours of operation resulted from such good faith negotiations. The specific decisions to remain open or to close on the dates discussed above were made at the meetings of the Chevrolet line group, and there is no suggestion of negotiation with employees or a union. We conclude that the non-statutory labor exemption does not protect the activities of Mr. Stewart or Stewart Chevrolet. There is no claim of a current collective bargaining agreement with an hours provision or a maintenance of standards provision. Part III of the order, therefore, applies to Mr. Stewart and Stewart Chevrolet.

I. Woody Pontiac Sales, Inc., and Woodrow W. Woody

Woodrow Woody has been the owner and president of Woody Pontiac Sales since it went into business in 1940. RRX 151 ¶ 3,4. Woody Pontiac is currently open weekdays until 6:00 p.m., except Monday and Thursday when it is open until 8:00 p.m. RRX 151 at ¶ 2.

Mr. Woody represented Woody Pontiac at the Pontiac line group meeting in which a decision was reached to close on Saturday during the summer months, beginning in 1969. CX-209. Woody Pontiac was listed as a participating dealership in the Pontiac line group advertisement of June 13, 1969, announcing the summertime Saturday closing. CX-3308. Woody similarly participated in the

1970, 1971 and 1972 Saturday summer closing. CX-213, CX-3314, CX-216, CX-217, CX-3324, CX-219-20, CX-3332. Woodrow Woody represented his dealership at the November 27, 1973, line group meeting in which the members of the association considered permanent Saturday closing. CX-225. In the line group's published advertisement, Woody Pontiac was listed as one of the dealerships that would close permanently on Saturday, beginning on December 1, 1973. CX-3354.

Mr. Woody's supplemental affidavit recites that at the time that he closed the dealership on Saturday, "I remember thinking about the union and the violence they had perpetrated in the past." RRX 151 at ¶ 7. He decided that it was not worth it to stay open on Saturday. *Id.*

As discussed above, the non-statutory labor exemption requires proof of good faith bargaining between the employer and the union or employees regarding the hours. Mr. Woody's supplemental affidavit and proposed findings make no claim that such negotiations occurred. We conclude that the non-statutory labor exemption does not shield Woody Pontiac's or Woodrow Woody's participation in an agreement among Pontiac dealers to reduce hours of operation. Part III of the order, therefore, applies to Mr. Woody and Woody Pontiac.

J. Jack Demmer Ford and John E. Demmer

Jack Demmer Ford was established in 1957 as an Edsel and Studebaker dealer, and in December 1959, it became a Ford dealer. Tr. 2564. In 1963, the dealership was open until 9:00 p.m. on Monday, Tuesday, Thursday and Friday, and was open until 6:00 p.m. on Wednesday and Saturday. Tr. 2568.

After discussions at the Ford line group meetings, of complaints by sales employees about the long hours, the dealers closed at 6:00 p.m. on Friday. Tr. 2572. In 1966, when the ASA was trying to organize the dealerships, the Ford line group discussed closing Tuesday at 6:00 p.m. and decided that the Ford dealers would all close at one time. Tr. 2576-77.

After a representation election in December 1966, the ASA became the bargaining representative of the sales employees at Jack Demmer Ford. Tr. 2578. In 1967, John Demmer began negotiations with the union regarding a collective bargaining agreement. Tr. 2579. In 1968, there was a long strike at Jack Demmer Ford, and the strike involved violence and vandalism, including an attempted bombing of

the clean-up shop. Tr. 2586-87. Jack Demmer Ford offered to close the dealership on Saturday, but despite the violence, he refused to agree to the union's demand for a closed union shop and never signed a contract with the union. Tr. 2579, 2588. After the strike, the sales employees at Jack Demmer Ford voted to decertify the union in October 1968. Tr. 2595. The dealership remained open on Saturdays after the decertification election. Tr. 2597.

In late 1968, the Ford line group met to discuss the complaints of the sales employees, and according to Mr. Demmer, "we kind of reached an agreement that we asked everybody to go along with and that was to close [on Saturday] from July the 4th the following year, I believe it was, until Labor Day, which is a period of about eight weeks." Tr. 2598-99. The following year the dealers decided to close on Saturday from Memorial Day until Labor Day. Tr. 2600. They subsequently decided to close on Saturday year-round. Tr. 2600.

Mr. Demmer's supplemental affidavit recites that he was familiar with a number of incidents of union violence. RRX 135. His affidavit states that "[h]e would not have reduced his hours or agreed with other dealers concerning his hours but for the demands of his employees and the employee unions and his apprehension of force and violence by the various unions which had demanded uniform hours reductions and who would enforce their demands through force and violence." RRX 135 at ¶ 28.

As developed above, the non-statutory labor exemption requires a showing of negotiations with a union or employees. During the period in 1967 and 1968 when the ASA represented the sales employees at Jack Demmer Ford, Mr. Demmer did negotiate with the union about closing the dealership on Saturdays, and he closed during the strike. No collective bargaining agreement was ever reached, and after the employees voted to decertify the union, the dealership remained open on Saturdays. According to Mr. Demmer's own testimony, the subsequent decisions to close on Saturday were the product of an agreement among dealers, not a result of good faith negotiation with employees. We conclude that the non-statutory labor exemption does not apply to the conduct of these respondents. In addition, they have not claimed to have a current bargaining agreement with a union or their employees. Part III of the order, therefore, applies to Mr. Demmer and Jack Demmer Ford.

K. Al Long Ford, Inc.

Tarik Daoud is and has been since 1972 the president and majority shareholder of Al Long Ford, Inc. RRX 134. In the 1960's, Al Long Ford was open from 8:30 a.m. to 9:00 p.m. on Monday, Tuesday and Thursday and from 8:30 a.m. to 6:00 p.m. on Wednesday, Friday and Saturday. RRX 134 at ¶ 6.

In May 1971, the Metropolitan Ford Dealers Association, of which Al Long Ford was a member, published advertisements, stating that "the majority" of metropolitan Ford Dealers would be closed on Saturday during the summer. CX-3326, 3327. On November 30, 1973, the Ford line group of which Al Long Ford was a member ran an advertisement stating that participating dealers would be closed on Saturdays, effective December 1, 1973. CX-3356. On December 2, 1973, Avis Ford ran an advertisement stating that the "Ford dealers of Metropolitan Detroit voted overwhelmingly to close" on Saturdays. CX-3358.

Mr. Daoud's supplemental affidavit recites that he was aware of various incidents of union violence at other dealerships. RRX 134. In addition to recollections about incidents that occurred elsewhere, Mr. Daoud also said that he witnessed violence during a strike at Al Long Ford in 1968 when he was the sales manager. RRX 134 at ¶¶ 12-13. According to his affidavit, rifle bullets were fired through the windows of the dealership, and cars on the lot were scratched and their windows broken. *Id.* He received threatening phone calls at home. *Id.*

Mr. Daoud's supplemental affidavit states that there were many discussions at the Metropolitan Detroit Ford Dealers Association regarding Saturday closing in 1972 and 1973. RRX 134 at ¶ 19. He states that the pressure from salespeople caused him to close. *Id.* His affidavit states that "I concluded and agreed to accommodate the sales personnel by instituting uniform hours and year round Saturday closing . . . to avoid unionization and similar violence against the Al Long Ford dealership." RRX 134 at ¶ 22. Although this sentence does not state with whom Mr. Daoud reached his agreement, the next sentence explains that the agreement was with the other dealers, not his employees. The next sentence in the affidavit is: "I would not have reduced the hours at the dealership or agreed with other dealers concerning the hours but for the demands of my employees and my apprehension of force and violence . . . ." RRX 134 ¶ 22.

Although Mr Daoud's affidavit refers to demands and pressure from th employees for shorter hours of work, he does not state that he entered negotiations or reached agreement with his employees or a union regarding hours of operation. Instead, it appears that whatever agreement was reached was among dealers. He candidly stated that one objective of the reduction in hours was to avoid unionization and violence. Al Long Ford survived a violent strike in the late 1960's, when Mr. Daoud was manager, without capitulating to the union and agreeing to eliminate Saturday work. Only in 1973 did the dealers agree among themselves to reduce hours as a means to avoid unionization. We reject the conclusion that the restraint on hours, which was adopted to forestall unionization was "imposed by a union," and find that the reduced hours were not the product of bargaining and agreement between the dealership and its employees. We conclude that the nonstatutory labor exemption does not apply to this respondent. There is no evidence of a current labor contract with a maintenance of standards or hours of operation clause. Part III of the order, therefore, applies to Al Long Ford.

L. Ed Schmid Ford, Inc., and Edward Schmid

Edward Schmid became the general manager of Ed Schmid Ford, Inc., in 1961 and purchased the dealership in 1962. Tr. 1891. When Mr. Schmid took over, the hours of operation were from 8:30 a.m. to 9:00 p.m. on Monday, Tuesday, Thursday and Friday and were 8:30 a.m. to 6:00 p.m. on Wednesday and Saturday. Tr. 1894. The service department was organized by the Teamsters. Tr. 1892. Mr. Schmid was opposed to unionization of his dealership and believed that the union hindered his ability to deliver high quality service to his customers. Tr. 1908.

The sales employees complained to Schmid about the long hours. Tr. 1897. During a time when a union was passing out literature to organize salesmen, the members of the Ford line group discussed early closing and picked Friday night to close early. Tr. 1899. The Ford line group's labor counsel recommended the early closing. Tr. 1900.

In 1967, the ASA won an organizing election at Ed Schmid Ford, and the dealership began the collective bargaining process with the union. Tr. 1914. The ASA demanded an end to all Saturday and night work, among other things. Tr. 1914-15. The dealership and

union reached an impasse in the bargaining, and the union went on strike in January 1968. Tr. 1915. There were incidents of vandalism at the dealership, and threats were made at the time of the strike. Tr. 1917. During the ASA strike of the sales employees, the employees of the parts and service department who were members of the Teamsters Union crossed the picket line and continued to work. Tr. 1915. Mr. Schmid said that the sales employees had not honored a Teamsters' picket line in 1964, and so the Teamsters refused to honor the ASA line. Tr. 1916. Mr. Schmid refused to sign a union contract, and the sales employees eventually gave up the strike and returned to work. Tr. 1918. According to his supplemental affidavit, when Mr. Schmid obtained an injunction against the picketing of his dealership, the strikers gave up, and no collective bargaining agreement was ever signed. RRX 137 at ¶ 26.

The dealers at the Ford line group meetings continued to discuss Saturday closing "to possibly head off union organizing." Tr. 1923. The summertime Saturday closing was discussed at the line group meetings, and the closing by other dealers influenced Mr. Schmid's decision to close on Saturday. Tr. 1928.

Mr. Schmid's supplemental affidavit recites the incidents of violence that occurred during the 1967-68 ASA strike at his dealership and his awareness of vandalism and violence at other dealerships. RRX 137. According to the affidavit, Mr. Schmid lived in fear of having both his sales and service departments organized by a union. RRX ¶ 15. He thought that would be "fatal" to a dealership in the event of a strike. *Id.* According to the affidavit, Mr. Schmid "would not have reduced his hours or agreed with other dealers concerning his hours but for the demands of his employees and the employee unions and his apprehension of force and violence directed by the various unions which had demanded uniform hours reductions and who would enforce their demands through force and violence." RRX 137 at ¶ 36. The agreement among dealers to close year round was made in 1973, approximately five years after Mr. Schmid had succeeded in breaking the ASA strike. In light of the dealers, agreement and Mr. Schmid's willingness to wait out a long and violent strike in 1967 and 1968 until the union gave up, we do not find that, in 1973, when no strike was in progress, the restraint arose from *bona fide* collective bargaining for shorter hours or as a direct result of union directed violence and force for shorter showroom hours. 955 F.2d at 468. Although the sales employees favored a

shorter work week, the affidavit does not claim that the restraint was a product of good faith bargaining between the employer and his employees or a union. The agreement to which Mr. Schmid refers is among dealers, not with employees. As developed above, proof of good faith negotiation is an essential element of the non-statutory labor exemption. We conclude that the non-statutory labor exemption does not apply. The record does not show that these respondents currently have a bargaining agreement. Part III of the order, therefore, applies to Mr. Schmid and Ed Schmid Ford.

M. Ray Whitfield Ford, Inc., and Raymond Whitfield

Raymond Whitfield has been the president and owner of Ray Whitfield Ford, Inc., since 1961. CX-3867 at 8, 13. Like many other dealers, Ray Whitfield Ford eliminated its evening hours on Friday, Tuesday, and Wednesday in the 1960's, and in the late 1960's, it began to close on Saturday in the summer. *Id.* at 41. It closed on Saturday throughout the year in the early 1970's. *Id.*

According to Mr. Whitfield's deposition, he participated in discussions at the Metropolitan Ford Dealers Association concerning whether to eliminate Saturday hours. CX 3867 at 48. He had many conversations with other dealers about closing on Saturday. *Id* at 53. Whitfield said that his business was good on Saturday, and he did not want to close. *Id.* at 55. He was concerned about vandalism and wanted to avoid unionization of his dealership. *Id.*

Mr. Whitfield's supplemental affidavit recites that he was familiar with the incidents of violence at Demmer Ford and Al Long Ford. RRX 136. Mr. Whitfield's affidavit states that in the mid-1960's, the ASA tried to organize salespeople, and that an ASA union organizer, Mr. Van Zant, told him that the union would "use whatever means were necessary" to close auto dealers on Saturday. *Id.* at ¶ 8. Shortly thereafter, some cars at his dealership were vandalized, and he found bullet holes in his showroom windows. *Id.* at ¶¶ 9-10. In the late 1960's, the Seafarers Union and a Teamsters local attempted unsuccessfully to organize his dealership. RRX 136 at ¶¶ 13-14.

Mr. Whitfield's remand affidavit states that he closed his dealership on Saturdays through the year in 1973, after threats that the union would use "any and all means, including violence, to shut" down all dealers and that he "would not have reduced his hours or agreed with other dealers concerning his hours but for the demands

of the employee unions and his apprehension of force and violence directed by the union." RRX 136 at ¶ 20. Neither the supplemental affidavit nor Mr. Whitfield's deposition, which was entered as an exhibit at trial, indicates that he reduced his hours of operation pursuant to an agreement reached after good faith negotiations with his employees or their union. The non-statutory labor exemption requires that the restraint be the result of good faith bargaining with the union or the employees.

Mr. Whitfield claims that concern about union violence motivated his decision to reach agreement with other dealers regarding hours rather than that he bargained in good faith with his employees or acted as a direct result of union directed violence. Indeed, according to the affidavit, the threat to use any means necessary and the vandalism occurred in the mid- or late-1960's, and the agreement among dealers to close Saturdays throughout the year was not reached until late 1973. The timing confirms that the restraint on hours resulted from the agreement among dealers, and not bargaining or other clash between Whitfield and his employees or a union representing the employees of Ray Whitfield Ford. Accordingly, we conclude that the exemption does not apply to these respondents. There is no claim that the employees of this dealership are covered by a collective bargaining agreement with an hours provision or a maintenance of standards clause. Part III of the order, therefore, applies to Mr. Whitfield and Ray Whitfield Ford.

In summary, we find that the respondents who participated in the remand proceeding did not restrict their hours of operation as a result of *bona fide*, arm's-length bargaining with employees or a union and are not exempt under the non-statutory labor exemption.[19] Although the respondents produced some evidence of violent incidents and threats of violence, the non-statutory labor exemption requires a showing of bargaining with employees or a union representing employees, not an agreement with competitors to limit hours because of violence or perceptions of violence. The record shows that some of the dealers who suffered the worst incidents of violence and threats did not concede, at the time of those incidents, to demands to restrict hours and appear to have been willing to endure the risks and losses in order to defeat the union. Such fortitude seems inconsistent with a claim that they were compelled at other points in time to join a conspiracy against their will.

[19] But *see supra* at 15 and Note 13.

Overall, the evidence shows that the automobile dealers in Detroit were unwilling to bargain with their employees over hours of operation. Instead, they reserved hours of operation for resolution with their competitors.

IV. THE SCOPE OF RELIEF

Apart from the interpretation of the non-statutory labor exemption, the Court of Appeals expressed "concern" about two aspects of the remedy imposed by the Commission.

First, the Court of Appeals directed the Commission to consider whether the thirty-day time period in Part VII.D of the order was sufficiently long. After due consideration and in accordance with the suggestion of the court, the Commission modifies Part VII.D to specify a sixty-day period, as provided in the accompanying order.

Second, Part III of the Commission's original order required the dealers to remain open for a minimum of 64 hours per week for a one-year period. The Commission found that a simple cease and desist order would not adequately remedy the violation of Section 5, and it imposed the requirement that dealerships remain open for 64 hours per week in an effort to "encourage competitive forces to operate." 111 FTC at 506.

The Court of Appeals stated:

> We suggest that the Commission consider giving dealers an option to maintain showroom hours for at least an average of ten and a half hours a day during weekdays, coupled with operation on Saturdays for some minimum additional time for the one year period.

955 F.2d at 472. After due consideration and in accordance with the suggestion of the court, the Commission modifies Part III of the order to give the respondents the option of electing, for the one year remedial period, either: (1) to maintain a minimum sixty-four hours of operation per week for the sale and lease of motor vehicles; or (2) to maintain a minimum hours of operation for the sale and lease of motor vehicles of an average of ten and a half hours per day during weekdays plus a minimum of eight hours on Saturday.

CONCLUSION

In accordance with the direction of the Court of Appeals, the Commission has reviewed the record, findings and supplemental evidentiary material submitted by the twenty-two respondents who participated in this remand proceeding. For the reasons stated above, the Commission concludes that the respondents entered agreements with competitors to reduce their hours of operation in violation of Section 5 of the Federal Trade Commission Act and concludes that these agreements are not exempt under the non-statutory labor exemption. The Commission further concludes that Part III of the order does not apply to Thompson Chrysler-Plymouth, Inc., or Joseph P. Thompson, provided there continues in effect a collective bargaining agreement containing a maintenance of standards provision like that in effect from September 14, 1989, through March 31, 1994, or that otherwise provides a basis for the exemption.[20]

In accordance with the direction of the Court of Appeals, the Commission hereby modifies Part III of the order to give the respondents the option to open for ten and one half hours per day on weekdays and ten hours per day on Saturdays and modifies Part VII.D to substitute a sixty-day period for the thirty-day period.

[20] *See* Note 13, *supra.*