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AN ANALYSIS OF THE POTENTIAL USE OF RICO TO IMPEDE THE FLOW OF RUNAWAY SHOPS

Leslie Tarantola*

I. INTRODUCTION

Title IX of the Organized Crime Control Act of 1970,1 more commonly known as the Racketeer Influenced and Corrupt Organizations Act ("RICO" or "the Act"),2 was originally proposed and enacted in an effort to combat the infiltration of organized crime into legitimate businesses, industries, unions and government agencies.3

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3. The Organized Crime Control Act, in its original form was introduced in January, 1969 by Senator John McClellan. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969). To encourage support for this bill, Senator McClellan made a speech to the Senate, on March 11, 1969, in which he reviewed the development of organized crime in the United States, including its structure; its activities in gambling, narcotics and loan sharking; and its infiltrations of legitimate businesses. 115 CONG. REC. 5872 (1969).

In March, 1969, Senator Hruska introduced a bill entitled the Criminal Activities Profits Act. S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6925 (1969). This version of the Act contained both criminal and civil sanctions, and was meant to attack the economic power of organized crime. 115 CONG. REC. 6993 (1969).


In December, 1969, the Organized Crime Control Act (amended to incorporate the Corrupt Organizations Act as Title IX) was reported to the Senate from the Judiciary Committee. S. Rep. No. 617, 91st Cong., 1st Sess. 215 (1969). On January 23, 1970, it was passed by the Senate. The vote was 73 to 1. 116 CONG. REC. 954 (1970). This was accomplished after much debate, including express concern by various Senators that the bill in its final form was too broad and went beyond an attack on organized crime. S. Rep. No. 617, 91st Cong., 1st Sess. 215 (1969). It was then referred to the House Committee on the Judiciary. 116 CONG. REC.
As it has evolved over the years, it has been the subject of numerous debates regarding its purpose, scope and applicability. The courts and commentators have interpreted RICO to have a broad application to a variety of cases, not only those involving "organized crime."  

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After extensive debates and hearings, the House passed its version of the bill which contained a private treble damages provision that went beyond existing antitrust concepts. 116 Cong. Rec. 35,364 (1970). The bill passed by a vote of 431 to 26. 116 Cong. Rec. 35,363. When the Act was returned to the Senate for consideration, it was accepted without conference. Senator McClellan stated that the changes made in the House "were not of major significance." 116 Cong. Rec. 36, 293 (1970). This legislation was signed by President Nixon on October 15, 1970. 116 Cong. Rec. 37, 264 (1970).

For an extensive exposition of the legislative history of RICO see Blakey, The RICO Civil Fraud Action in Context: Reflections on Benett v. Berg, 58 Notre Dame L. Rev. 237, 249-283 (1982). Mr. Blakey, was the Chief Counsel to the Senate Subcommittee on Criminal Laws and Procedures of the United States Senate from 1969 to 1970 when the Organized Crime Control Act of 1970 was processed.

4. See infra note 5.


Furthermore, RICO contains a liberal construction clause which provides that its provisions "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970).

See also Blakey, supra note 3, at 280 (emphasis in original). Blakey submits that after a review of RICO's legislative history the following are established beyond serious question:

(1) Congress fully intended, after specific debate, to have RICO apply beyond any limiting concept like "organized crime" or "racketeering";
During the first decade following its passage, the overwhelming majority of lawsuits brought under the Act were federal criminal prosecutions. Civil litigation under RICO did not really begin until the 1980s. However, once it began, it took off. The potential benefits of a civil RICO lawsuit are considerable. It provides a basis for federal jurisdiction, nationwide service of process and venue, and remedies which include treble damages, attorney’s fees and injunctive relief.

Labor organizations have become familiar with RICO as a weapon used against them by the Government, employers, and other civil litigants. Despite Labor’s fears of RICO, however, there are significant possibilities for unions to use this statute as an offensive weapon.

This article will explore the potential use of RICO as a tool to combat the ever-growing and serious problems of “runaway shops” and “double breasted operations.” The term runaway shop is used to describe a plant relocation from a unionized facility to a non-unionized operation. Double breasted operation is the term used for a

(4) Over specific objections raising issues of federal-state relations and crowded court dockets, Congress deliberately extended RICO to the general field of commercial and other fraud; and
(5) Congress was well aware that it was creating new federal criminal and civil remedies in a field traditionally occupied by common law fraud.
Of 270 district RICO decisions prior to this year, only 3% (nine cases) were decided throughout the 1970’s, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984.
See generally Wexler, supra note 5, for a detailed discussion of initial successful attempts of civil RICO suits.
In Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 273-74 (1965), the Supreme Court held that an employer has the absolute right to close his entire business, even if motivated solely by anti-union animus, and that such an action will not be an unfair labor
partial relocation or a shifting of a portion of operations from a unionized facility to a newly created or existing non-union facility or company. Although employers make such moves for a variety of reasons, the usual motivation is a desire to evade unionization, collective bargaining and contractual obligations. Traditionally this has been accomplished by moves from areas where unionization is prevalent to areas which have lower labor costs. Both runaway shops and double breasted operations have become a major concern to the entire labor movement. They pose a threat to the stability and existence of unions, as both involve the transfer or shifting of work to evade unionization or a collective bargaining agreement.

A brief discussion of the elements of a RICO offense will be presented, for it is necessary to understand RICO's breadth if it is to become a useful tool. This will be followed by a discussion concerning the issue of plant and/or work relocations, the problems they pose for unions and the current law and trends in this area. The remainder of this article will focus on how RICO can be used to impede the flow of runaway shops and unionized work with it, along with its advantages and potential remedies.

II. THE ELEMENTS OF A RICO ACTION

The main substantive provision of RICO is Section 1962, which specifies the “prohibited activities” which must be proven in order to establish either a criminal or civil violation under the Act. The first

practice. There must be, however, a complete and final cessation of business. Id. at 272-75. The Court created the “runaway shop exception” to its holding, referring to the transfer of a plant to another location, allowing the employer to remain in business. This will constitute an unfair labor practice because it will “chill unionism” at the employer's other plants and discourage the free exercise of the employees' § 7 rights. Id. While this case arises in the context of a § 8(a)(3) violation, it is nevertheless useful in understanding the issue of runaway shops.


12. 18 U.S.C. § 1962 (1982), which provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through a collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to
prohibition under this section is aimed at organized crime's practice of "laundering dirty money" by investing it in a legitimate business. It is an unlawful act to invest income derived from a "pattern of racketeering activity" to acquire an interest in or to operate an "enterprise." The second prohibition makes it unlawful to acquire an interest in an "enterprise" through a "pattern of racketeering activity," and is aimed at preventing organized crime from "muscling in" on legitimate businesses. The third subsection prohibits the conduct of the affairs of an "enterprise" through a "pattern of racketeering activity." The final prohibition makes it unlawful to conspire to violate any of the above provisions. In order to establish a prima facie case under RICO, it is necessary to prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." 

A. The Enterprise Requirement

"Enterprise" has been defined very broadly to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Additionally, the enterprise must engage in or affect interstate or foreign commerce. The term enterprise has been the subject of numerous and often inconsistent interpretations. It is

_13. 18 U.S.C. § 1962 (a)._
_14. 18 U.S.C. § 1962 (b)._
_15. 18 U.S.C. § 1962 (c)._
_16. 18 U.S.C. § 1962 (d)._
_18. 18 U.S.C. § 1961(4) (1982). For the purposes of this article, any employer will constitute an enterprise within the meaning of the Act._
_20. See infra notes 21-28 and accompanying text._
clear, however, that a RICO enterprise can include both legitimate and illegitimate associations, even those which engage solely in unlawful activity.\textsuperscript{21} An individual can also constitute an enterprise for purposes of RICO.\textsuperscript{22} The courts are divided over the issue of whether or not a governmental entity constitutes an enterprise.\textsuperscript{23}

\textsuperscript{21} United States v. Turkette, 452 U.S. 576 (1981). In Turkette, the defendant enterprise consisted of a group of individuals associated for the purpose of trafficking illegal drugs. The defendants contended that RICO was intended solely to protect legitimate business enterprises from infiltration by racketeers and, therefore, did not extend to illegal associations. The Court in rejecting this argument reasoned that:

\begin{quote}
On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones. Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, “legitimate.” But it did nothing to indicate that an enterprise of a group of individuals was not covered by RICO if the purpose of the enterprise was exclusively criminal.
\end{quote}

\textit{Id.} at 580-81. The Court further reasoned that since Section 1961(4) describes two categories of associations that come within the purview of the “enterprise” definition. The first encompasses organizations such as corporations and partnerships, and other “legal entities.” The second covers “any union or group of individuals associated in fact although not a legal entity.” . . . Each category describes a separate type of enterprise to be covered by the statute—those that are recognized legal entities and those that are not.

\textit{Id.} at 581-82.

Furthermore, a majority of the circuit courts that have addressed this issue have held that enterprise includes both legitimate and illegitimate associations. See \textit{id.} at 578 n.1. See generally Bradley, supra note 5, at 851-58.


\textsuperscript{23} This has been a sensitive issue, and there has been disagreement among the courts as to whether a government entity is an enterprise within the meaning of § 1961(4). In United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), \textit{aff'd} and \textit{remanded} on \textit{reh'g}, 602 F.2d 653 (4th Cir. 1979), the court rejected the argument that a government entity could be an enterprise. In this case, the Governor of Maryland was charged with accepting bribes in exchange for promoting favorable legislation for certain race tracks in the state; the enterprise was the State of Maryland. The court after reviewing RICO's legislative history, reasoned that it was aimed at the infiltration of legitimate businesses.

\begin{quote}
[T]o include “states” within the meaning of “enterprise” would clearly result in what could only be characterized as a startling departure from the traditional understanding of federal-state relationships. Unless Congress has clearly indicated its intentions to “alter sensitive federal-state relationships,” courts should be reluctant to give ambiguous phrases within a statute that effect.
\end{quote}


However, there are jurisdictions which have held that a government entity can be an enterprise for purposes of RICO. See, e.g., United States v. Angelilli, 660 F.2d 23 (2d Cir. 1981), \textit{cert. denied}, 455 U.S. 945, \textit{reh'g denied}, 456 U.S. 939 (1982) (New York City Civil Court is an enterprise); United States v. Vignola, 464 F. Supp. 1091 (E.D. Pa.), \textit{aff'd}, 605 F.2d 1199 (3d Cir. 1979), \textit{cert. denied}, 444 U.S. 1072 (1980) (Philadelphia Traffic Court is an enterprise); United States v. Kovic, 684 F.2d 512 (7th Cir.), \textit{cert. denied}, 459 U.S. 972 (1982) (city police department is an enterprise); United States v. Brown, 555 F.2d 407 (5th Cir.)
Factors such as a common or shared purpose, continuity of structure and personnel, and an ongoing membership will be considered in determining whether a RICO enterprise exists. The enterprise, however, must have a structure separate and distinct from the pattern of racketeering activity. A nexus between the predicate acts and the enterprise must be established, but it is not necessary to show that the enterprise benefitted by the pattern of racketeering activity or that the defendant possessed an overriding financial interest in the enterprise. See generally Bradley, supra note 5, at 858-61.


Some courts, however, have found the existence of an enterprise by reference to the pattern of crimes themselves. See United States v. Rone, 598 F.2d 564 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Elliot, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978); United States v. Altese, 542 F.2d 104 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975). Contra United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), cert. denied, 453 U.S. 912 (1981). In Sutton, the court reasoned that:

\[ \text{the draftsmen would not have opted for so complex a formulation if the legislative purpose had been merely to proscribe racketeering, without more. A straight forward prohibition against engaging in "patterns of racketeering activity" would have sufficed, and there would have been no need for references to "enterprises" of any sort.} \]

Id. at 266. The court concluded that the enterprise must be something more, separate and apart from the pattern of crimes. Id.

26. Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), cert. denied, 464 U.S. 1008 (1985). The court in Bennett held that RICO does not simply prohibit "engaging in a pattern of racketeering activity" but instead is directed to "conducting the affairs of an enterprise through a pattern of engaging in the predicate crimes." Id. at 1061 n. 10 (emphasis in original). Thus there must be some nexus between the enterprise itself, its purposes, and the racketeering activity.

In United States v. Cauble, 706 F.2d 1322, 1332-33 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1985), the test to be used in determining whether the nexus requirement is satisfied is:

\[ \text{a defendant does not "conduct" or "participate in the conduct" of a lawful enterprise's affairs, unless (1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant's position in the enterprise facilitated his commission of the racketeering acts; and (3) the predicate acts had some effect on the lawful enterprise.} \]

27. Cauble, 706 F.2d at 1333 n. 24. It is not necessary to "prove that the racketeering activity 'benefited' or 'advanced the affairs of' the enterprise." Id. (citations omitted). It need only be proven "that the racketeering acts affected the enterprise in some fashion." Id.
motive.\textsuperscript{28}

B. The Pattern of Racketeering Activity Requirement

"Racketeering activity" is defined as the commission of any of several enumerated federal and state crimes,\textsuperscript{29} commonly referred to as "predicate acts,"\textsuperscript{30} ranging from mail fraud to murder. A "pattern of racketeering activity" is defined as the commission of at least two predicate acts within ten years of one another, one of which must have occurred after October 15, 1970 (the effective date of RICO).\textsuperscript{31} The term "pattern" as used in section 1961(5) is a mis-

\textsuperscript{28} United States v. B\textsuperscript{a}garic, 706 F.2d 42, 53 (2d Cir.), cert. denied, 464 U.S. 840 (1983). The court held that the offenses proscribed by RICO are activities punishable irrespective of any particular motive for performance and that a requirement of proving that economic gain was the sole motive of a RICO enterprise would "run counter to fundamental principles of criminal law." \textit{Id.}

\textsuperscript{29} 18 U.S.C. § 1961(1) (1982), which provides:

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to obstruction of State of local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (related to racketeering), section 1953 (related to interstate transportation of wagering paraphernalia), section 1954 (related to unlawful welfare fund payments), section 1955 (related to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

\textsuperscript{30} Throughout RICO case law these enumerated crimes are referred to as predicate offenses or acts. See, e.g., \textit{Sedima S.P.R.L. v. Imrex Co., Inc.}, 105 S. Ct. 3275 (1985).

\textsuperscript{31} 18 U.S.C. § 1961(5) (1982), which provides:

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.
leading characterization of the requirements necessary to prove this element, and gives rise to two issues. 32

The first issue concerns whether the term “pattern” requires some relationship between the acts, or whether two unrelated acts will be enough. The majority of courts addressing this issue have held that the two predicate acts need not be related to each other, but must be related to the affairs of the enterprise. 33 Courts rejecting this interpretation hold that the two predicate acts must be interrelated. 34 The latter interpretation is aimed at limiting the possible overreaching application of RICO that the former interpretation may have. 35

The second issue that arises is whether the two acts may be part of a single scheme, or whether they must be independent wrongs. Section 1961(5) requires the commission of two predicate offenses,

32. See infra notes 33-38 and accompanying text.

33. United States v. Elliot, 571 F.2d 880, 899 n.23 (5th Cir.), cert. denied, 439 U.S. 953 (1978). In United States v. De Palma, 461 F. Supp. 778 (S.D.N.Y. 1978), the predicate acts alleged were unrelated. One involved securities fraud and the second, bankruptcy fraud. The court held:


The legislative history, however, seems to support the minority view. Senator McClellan, the sponsor of the bill, responding to criticism quoted the following language:

The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one “racketeering activity” and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.


35. These courts feel that this interpretation will limit RICO’s application to those types of cases originally contemplated by RICO’s sponsors. That is, ongoing criminal activity designed to infiltrate and takeover legitimate businesses. See cases cited supra note 34. See also Bradley, supra note 5 at 863.
defined as any act “indictable” or “chargeable” under various federal and state statutes. The statutory language is quite clear, and the courts have agreed, that any two acts will satisfy the pattern requirement, even if they arise out of the same episode. Thus it is not necessary to establish two or more totally independent acts.

C. Other Issues RICO Raises

Another hotly contested issue raised by RICO was whether prior convictions on the predicate acts were a prerequisite for a plaintiff to bring a private civil action under section 1964(c).

The Second Circuit, in a series of decisions culminating in Sedima S.P.R.L. v. Imrex Co., Inc. (Sedima I), held that a conviction on the underlying predicate offenses was an absolute necessity. The court was concerned that the lesser burden of proof required in a civil case would be applied to criminal violations. It reasoned that

38. See cases cited supra note 37.
39. Section 1964 provides for civil remedies under RICO and states:
   (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
   (b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
   (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney's fee.
   (d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegation of the criminal offense in any subsequent civil proceeding brought by the United States.
40. 741 F.2d 482 (2d Cir. 1984). See also Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984); Bankers Trust Co. v. Rhode, 741 F.2d 511 (2d Cir. 1984).
since "the RICO scheme calls for only criminal conduct to be punished, it thus appears that in the absence of previous convictions a civil plaintiff must carry a burden equal to that in a criminal case." It further reasoned that "Congress assumed a preponderance standard was appropriate" and therefore, drawn to its logical conclusion "a criminal conviction must precede a private civil suit."

The views of the Second Circuit on this issue were not widely accepted. The Sixth Circuit, in *USACO Coal Co. v. Carbomin Energy, Inc.*, specifically rejected a prior conviction requirement. The court reasoned that the plain language of RICO does not require a prior conviction, and that if Congress had intended to limit liability in that manner, it would have done so specifically. Many other courts support this view and have also rejected a prior conviction requirement.

The Supreme Court, reversed the Second Circuit decision (*Sedima II*), and held that there is no requirement that a private civil action can proceed only against a defendant who has already been convicted of the predicate acts. The Court, after a review of the legislative history and the exact language of the Act, found that neither could be interpreted to include such a requirement, and stated, "[t]o the contrary, every indication is that no such requirement exists." The Court went on to quote language from a Senate

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42. Id. at 502. The Court also expressed concern with the fact that "garden-variety fraud" would become stigmatized as "racketeering," which in the Second Circuit's opinion did not coincide with Congressional intent. Id. at 503.
43. 689 F.2d 94 (6th Cir. 1983).
44. Id. at 95 n.1.
46. 105 S. Ct. 3275 (1985) (hereinafter *Sedima II*). This case reversed and remanded the Second Circuit's decision in *Sedima S.P.R.L. v. Imrex Co.*, Inc., 741 F.2d 482 (2d Cir. 1984) (hereinafter *Sedima I*).
47. *Sedima I*, 105 S. Ct. at 3284.
48. The Court found that:

The language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction. The word "conviction" does not appear in any relevant portion of the statute . . . . To the contrary, the predicate acts involve conduct that is "chargeable" or "indictable," and "offense[s]" that are "punishable," under various criminal statutes . . . . As defined in the statute, racketeering activity consists of acts for which the defendant has been convicted, but of acts for which he could be.

Id. at 3281.
49. Id. at 3284.
Report which defined racketeering as “an act in itself subject to criminal sanction.” Nor could the Court find any policy considerations to justify a prior conviction requirement.

Furthermore, the Court did not appear to be overly concerned with the burden of proof issue raised by the Second Circuit, nor were they convinced that the predicate acts must be established beyond a reasonable doubt in civil RICO actions. However, the Court did not decide this issue. Additionally, the Court specifically addressed and dismissed the Second Circuit’s concern about the possible unjust imposition of a racketeering label on a defendant.

Sedima I also addressed the type of “injury” a plaintiff must prove. The question before the court was whether there was a “racketeering injury” requirement in the Act or whether proof of injury resulting from the predicate acts themselves was sufficient. The Second Circuit held that a plaintiff in a civil action had the obligation to prove an injury distinct from that caused by the predicate acts. The plaintiff must prove a “racketeering injury,” that is, one that is caused by the activity “RICO was designed to deter.” Other courts

50. Id. at 3281 (quoting S. Rep. No. 91-617) (emphasis in original). The Court stated that a prior conviction requirement could not be found in the definition of “Racketeering activity” or in any other of the Act’s provisions. Id.

51. The Court said in fact that such a requirement might “severely handicap potential plaintiffs” because a “guilty party may escape conviction for any number of reasons.” Sedima II, 105 S. Ct. at 3284.

52. That the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction. Id. at 3283.

53. The Court found that “[i]n a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard.” Id. at 3282 (citations omitted).

54. Id. at 3283.

55. The Court stated that “[i]f there is a problem with thus stigmatizing a garden variety defrauder by means of a civil action, it is not reduced by making certain that the defendant is guilty of fraud beyond a reasonable doubt.” Id. (emphasis in original).

56. The court stated that “RICO was not intended to provide additional remedies for already compensable injuries but rather to provide additional remedies to fight organized crime.” Sedima I, 741 F.2d at 494. See also Furman v. Cirrito, 741 F.2d at 528; Bankers Trust Co. v. Rhoades, 741 F.2d at 516.

57. Sedima I, 741 F.2d at 494-95. The court defined “racketeering injury” as an injury which RICO was designed to deter. The court looked to the Congressional purpose for enacting RICO. [O]rganized crime activities in the United States weaken the stability of the Nation’s economic system, harm innocent investors and competitors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens. Id. (citations omitted). This is the kind of injury RICO was designed to deter.
also supported this view.\textsuperscript{58}

In \textit{Haroco, Inc. v. American National Bank and Trust Co.},\textsuperscript{59} the Seventh Circuit addressed the same issue and held to the contrary. The \textit{Haroco} court expressly rejected the requirement of proof of a distinct "racketeering injury." The court stated that such a requirement would pose the difficult task of exactly defining a "racketeering injury."\textsuperscript{60} In addition, the court expressed the opinion that Congress intended the Act to be read broadly and that restrictions such as the one at issue should not be imposed.\textsuperscript{61}

The Supreme Court reversed the Second Circuit in \textit{Sedima II}, and held, as had the Seventh Circuit, that there is no distinct "racketeering injury" requirement.\textsuperscript{62} The Court reasoned that the concept of "racketeering injury" was vague and the extreme difficulty of defining it was sufficient reason to decide against the imposition of such a requirement.\textsuperscript{63} The Court further stated that "[t]here is no room in the statutory language for an additional amorphous 'racketeering injury' requirement."\textsuperscript{64}


\textsuperscript{60} The court in \textit{Haroco} pointed to two lower court decisions in which the requirement was imposed, but no precise definition was given; only a blanket statement that these courts "would know a racketeering enterprise injury when they saw one." \textit{Haroco}, 747 F.2d at 389. \textit{See also} Willamette Savings & Loan v. Blake & Neal Finance Co., 577 F. Supp. 1415, 1430 (D. Ore. 1984); Waste Recovery Corp. v. Mahler, 56 F. Supp. 1466, 1468-69 (S.D.N.Y. 1983). Both these cases imposed this requirement without defining it.

\textsuperscript{61} "Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes." \textit{Haroco}, 747 F.2d at 390 (quoting Sutliff, Inc. v. Donovan Co., 727 F.2d 648, 654 (7th Cir. 1984)). \textit{See also} Windsor Assoc., Inc. v. Greenfield, 564 F. Supp. 273 (D. Md. 1983).

\textsuperscript{62} 105 S. Ct. at 3284.

\textsuperscript{63} The Court has affirmed the Seventh Circuit in American Nat'l Bank and Trust v. Haroco, 105 S. Ct. 3291 (1985).

\textsuperscript{64} 105 S. Ct. at 3285. In addition, the Court reasoned:

Given that "racketeering activity" consists of no more or no less than commission of a predicate act, ... we are initially doubtful about a requirement of a "racketeering injury" separate from the harm from the predicate acts ... . Section 1962 in turn makes it unlawful for "any person"—not just mobsters—to use money derived
Although the Supreme Court has resolved the issues of necessity of prior criminal convictions and a distinct "racketeering injury," many issues still remain unresolved, among them, the standing required to bring a civil action under RICO. Some courts have imposed an initial standing requirement that there be a "competitive injury," and that the class of potential plaintiffs be limited to those injured as competitors. These courts reasoned that because RICO was intended to prevent "money and power 'obtained from . . . illegal endeavors' from being [used] . . . to interfere with free competition and to burden interstate and foreign commerce," an injury to business or property must be alleged. Because the language of section 1964(c) closely resembles that of the antitrust laws the courts have held that "injury to property" must be an injury to competitive or commercial interests.

A majority of courts have explicitly rejected this reasoning and have held that no such "competitive injury" requirement exists. These courts acknowledge the fact that RICO was intended to combat organized crime's threat to the free market economy, and not that RICO was an extension of the antitrust laws. Instead, "Con-

67. See cases cited supra notes 65-66.
69. See, e.g., Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), aff'd en banc, 710 F.2d 1361, cert. denied, 464 U.S. 1008 (1985). In Bennett, the court reasoned that different policies underlie the two bodies of law.

In a RICO context there are few countervailing reasons to lessen the impact of RICO remedies by importing the limitations of standing which apply in antitrust law. In other words, although RICO borrowed tools of antitrust law to combat organized criminal activity, we do not believe the RICO Act was limited to the antitrust goal of preventing interference with free trade. Congress did not see the objectives of RICO and the antitrust laws as coterminous. Id. at 1059 (citations omitted).

The legislative history also supports this view. Senator McClellan, sponsor of RICO,
gress. . . enacted RICO as a separate tool in the fight against organized crime."

The rejection of the "competitive injury" requirement is important to the premise of this article. Labor organizations may encounter insurmountable standing problems if they are required to allege a competitive injury, because most labor organizations are not competitors in the real sense of the term. They do not compete for a piece of the free market economy with the companies in which they represent employees, but are nevertheless injured by actions taken by these companies.

There are many other issues raised in RICO litigation regarding its interpretation and application. However, a discussion of all of

commented:

[RICO] draws heavily upon the remedies developed in the field of antitrust. Nevertheless, . . . I believe it is necessary to make several clarifying remarks on the antitrust remedies this bill provides. The first is that the equitable remedies used in the field of antitrust law always existed. Because the remedies have been effective in removing and preventing harmful behavior in the business segment of our economy, they show great promise as tools for attacking organized crime. There is, however, no intention here of importing the great complexity of antitrust law enforcement into this field. Nor is there any intention of using the antitrust laws for a purpose beyond the legislative intent at the time of their passage.

The many references to antitrust cases are necessary because the particular equitable remedies desired have been brought to their greatest development in this field, and in many instances they are the primary precedents for the remedies in this bill. Nor do I mean to limit the remedies available to those which have already been established. The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice. This ability is not hindered by this bill.

115 Cong. Rec. 9567 (1969). Furthermore, the President of the American Bar Association, testifying on behalf of a separate RICO statute, stated:

[T]he use of the antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with a body of precedent-appropriate in a purely antitrust context-setting strict requirements on questions such as "standing to sue" and "proximate cause."


70. Schact v. Brown, 711 F.2d 1343, 1357 (7th Cir.), cert. denied, 464 U.S. 1002 (1983). The court in Schact found that if Congress had intended this type of limited application it could have simply amended existing antitrust laws "to provide remedies for competitive harm caused by racketeering infiltration." Id. at 1358.

71. One final issue worth noting is that of mens rea. The courts today have uniformly established that neither the legislative history, nor the provisions of RICO, include a scienter requirement over and above that which is required to establish a violation of the predicate acts. See, e.g., United States v. Scotto, 641 F.2d 47, 55 (2d Cir. 1980). The court in Scotto held that RICO does not require a finding of specific intent to engage in an unlawful pattern of racketeering. All that is required is general criminal intent or purpose. Id. at 56. See also
them would be outside the scope of this article. The analysis of RICO thus far should provide the reader with some insight into the intricacies of RICO, and a foundation upon which the remaining sections of this article will build.

III. DISCUSSION OF RUNAWAY SHOPS, DOUBLE BREASTED OPERATIONS—LAW AND TRENDS

Section 8(a)(5) of the National Labor Relations Act (NLRA) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of the employees. This duty to bargain is defined in section 8(d) of the NLRA and requires that the parties “confer in good faith with respect to wages, hours and other terms and conditions of employment.” These provisions have been characterized as mandatory subjects of bargaining. The controversy over whether or not plant relocations (runaway shops) and partial relocations (double breasted operations) constitute mandatory subjects of bargaining giving rise to a duty to bargain still exists.

A. Runaway Shops

The Supreme Court has held that section 8(a)(5) is violated when an employer unilaterally changes a mandatory subject, without first bargaining to impasse with the employee’s representatives. Based on this reasoning the National Labor Relations Board (“NLRB” or “the Board”) in Milwaukee Spring Division of Illinois Coil and Spring (Milwaukee Spring I) held that a company’s decision to relocate its operations to a non-unionized facility, without the unions’ consent, constituted an unfair labor practice, even though the decision was economically motivated.

Milwaukee Spring I, involved the Illinois Coil and Spring Com-

76. See notes 77-112 infra and accompanying text.
pany (hereinafter Company), which had three locations—Holly Spring, McHenry Spring and Milwaukee Spring. Both Holly Spring and Milwaukee Spring were unionized. McHenry Spring was not. The United Automobile Workers (hereinafter Union) represented the employees at the two unionized plants. In January, 1982 the Company, during contract negotiations, asked the Union to forego a scheduled wage increase and to grant other contract concessions at the Milwaukee location. The Company and the Union met to discuss possible concessions. The union membership voted against the company's request that the employees take a cut in wages and fringe benefits.

After further discussions failed to achieve concessions from the union, the Company decided to relocate its Milwaukee operations to the McHenry Spring facility, where labor costs were lower. The Holly Spring plant was also closed and relocated to McHenry Spring. No unfair labor practice charges had been filed concerning this relocation.

The Board held that the Company's decision constituted a midterm modification within the meaning of section 8(d), and that the union must consent to such a move by the Company. The Board ordered that the Company restore *status quo ante* by returning its operation to Milwaukee and reinstating its employees.

The Board relied on its earlier decision in *Los Angeles Marine Hardware Co.* In *Los Angeles Marine Hardware*, the company transferred a portion of its business from a union facility to a non-union facility, while the collective bargaining agreement was still in effect. As in Milwaukee Spring, the company was motivated by a desire to obtain relief from an adverse economic problem. The Board found critical the existence of a collective bargaining agreement and that such a decision was motivated by a desire to obtain economic relief from the terms of the contract. The Board further held that

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79. The contract called for $8.00 per hour and $2.00 per hour in fringe benefits. The company wanted to reduce wages to $4.50 per hour and fringe benefits to $1.35 per hour. These were the labor costs at the McHenry Spring plant. *Id.* at 207, 111 L.R.R.M. at 1487.
80. 18 U.S.C. § 158(d) which provides in pertinent part:

[T]hat no party to such contract, shall terminate or modify such contract, unless the party desiring such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications.
81. 265 N.L.R.B. at 210, 111 L.R.R.M. at 1487.
82. *Id.* at 211, 111 L.R.R.M. at 1490.
84. 265 N.L.R.B. at 208, 111 L.R.R.M. at 1488.
"the mandate of § 8(d) . . . 'is not excused either by subjective good faith or by . . . economic necessity . . .'," and that such actions were "inherently destructive of employee interests."\(^8\)

The Ninth Circuit enforced the Board's decision in *Los Angeles Marine Hardware* and specifically affirmed that a company cannot alter mandatory contract terms without the union's consent.\(^8\) The "desire to escape the financial burden they contracted for is not an adequate business justification that would excuse unlawful terminations."\(^8\)

In *Milwaukee Spring I*, the company filed a petition with the Seventh Circuit, for a review of the Board's decision, and the Board filed a cross application for enforcement of its order.\(^8\) However, the composition of the Board changed, and the new Board moved the court to have the case remanded for additional consideration.\(^9\) The motion was granted and gave rise to *Milwaukee Spring II*.\(^9\)

In *Milwaukee Spring II* the newly appointed Board reversed the *Milwaukee Spring I* decision, and held that an employer could lawfully relocate work from a union to a non-union facility during the term of a collective bargaining agreement, without the union's consent, even for the sole purpose of reducing labor costs.\(^9\) However, the parties are first required to bargain in good faith to impasse over the decision.\(^9\) The Board reasoned that such an action was lawful absent a specific contract provision prohibiting such a move, i.e., a work preservation clause.\(^9\) If, however, the contract did contain a specific contract provision, such a relocation would violate the terms of the contract, unless union consent was obtained.\(^9\) The Board further reasoned that it was not appropriate for the Board to find an

\(^8\) Id. (citing *Los Angeles Marine Hardware Co.*, 235 N.L.R.B. at 735-36, 98 L.R.R.M. at 1571-72.
\(^9\) *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302, 1307 (9th Cir. 1979).
\(^9\) Id. at 1307.
\(^9\) Id.
\(^9\) Id.
\(^9\) Id. at 603-04, 115 L.R.R.M. at 1069.
\(^9\) Id. at 602, 115 L.R.R.M. at 1066. "[T]he employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change." Id. This is perhaps an unrealistic notion. Since all that is required is bargaining, the employer may appear to be bargaining in good faith, while in actuality, the bargaining efforts are a sham.
\(^9\) The Board stated that before a section 8(d) violation can be found "the Board must first identify a specific term 'contained in' the contract, contained in that the Company's decision to relocate modified." Id.
\(^9\) Id.
implied work preservation clause in every collective bargaining agreement, as had the Milwaukee Spring I Board. Additionally, the Board claimed that Los Angeles Marine Hardware, the case relied on in Milwaukee Spring I, was a misapplication of the then current Board law. The Board explicitly overruled the Los Angeles Marine Hardware decision.

The Milwaukee Spring II decision has paved the way for runaway shops. If an employer can show that the decision to relocate was economically motivated, that the contract was silent on work preservation, and that a good faith bargaining relationship existed, the relocation is lawful.

B. Double Breasted Operations

The state of the law regarding double breasted operations is similar to that of runaway shops. Whether an employer can relocate part of the operations to another facility or subcontract out union work to nonunion employees, will depend on whether the decision is a mandatory subject of bargaining. The Board and the courts have held that a decision which changes the nature, scope and direction of the business, lies at the core of entrepreneurial control and is not a mandatory subject of bargaining. However, a duty to bargain will be imposed when the decision is based on labor costs. In First National Maintenance Corp. v. NLRB, the Supreme Court held that a company's decision to terminate its service operations, strictly for economic reasons, was not a mandatory subject of bargaining. Although First National Maintenance involved a partial closing, rather than a partial relocation, it is nevertheless useful to consider the Court's reasoning, for this holding has been applied to

95. Id. at 603, 115 L.R.R.M. at 1067.
96. Id. at 603, 115 L.R.R.M. at 1066.
97. Id. at 604, 115 L.R.R.M. at 1068. The Board stated that the governing principles were as follows: "[u]nless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if: (1) the employer . . . [bargains] in good faith to impasse; and (2) the employer is not motivated by anti-union animus." Id. (citations omitted).
98. Id. at 604, 115 L.R.R.M. at 1069.
100. See cases cited supra note 99.
double breasted operations. In *First National Maintenance*, the company decided to terminate its service operations under one particular contract because it was no longer profitable. This resulted in the discharge of those employees performing services under that contract. The Court found that the decision to halt work at a specific location represented a significant change in the company's operations. The court stated that "[t]his decision, involving a change in the scope and direction of the enterprise, is . . . 'not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.' " The Court further reasoned that a decision should be a mandatory subject of bargaining, if requiring bargaining would promote the fundamental purpose of the NLRA. The Court, therefore, limited mandatory subjects to those "amenable to resolution through the collective bargaining process." Subjects over which the union has some control, such as wages and fringe benefits, are best suited for resolution through the bargaining process.

The Court further adopted a balancing test to determine when bargaining over a decision will be required. This test required an employer to bargain only if the burden on the company is outweighed by the benefits to the union. The NLRB has explicitly adopted this balancing test in similar cases.

In light of *First National Maintenance*, it appears that an employer may transfer work, without obtaining the union's consent and without bargaining about the decision, if there is proof that the decision effected a "change in the nature and direction" of the business. Even if an employer fails to prove this, an employer under *Milwaukee*...
ke Spring II, can after bargaining to impasse, take such action if there is no specific work preservation clause.

A section 8(a)(5) violation will be found if the union can prove that the employer deliberately diverted unit work from a union to a non-union facility in order to evade contractual obligations, or if the union can prove that anti-union animus or a desire to chill unionism was the motive for the move. However, absent proof of such animus, the employer will be able to successfully defend against the unfair labor practice complaint if the transfer of work was based on external factors such as a decision by a customer to change its supplier.

Therefore, unless a union can establish that anti-union animus was the motivating factor behind a relocation decision it is almost powerless to stop the move and, in essence, the entire flow of work and runaway shops. It is for this reason, that RICO's potential use in this area is being explored.

IV. IS RICO PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT?

Preemption of RICO by the NLRA could prove to be an obstacle limiting RICO's use in the runaway shop and double breasted operation context. The case of United States v. Boffa involved a RICO claim which was based on a violation of the mail fraud statute. The defendant was charged with having used the mails to further a "labor-switching" scheme. The indictment charged that Boffa allegedly switched labor-leasing contracts from one corporation that he controlled to another that was ostensibly independent but in actuality was controlled by Boffa. To obtain cooperation in this scheme,
Boffa allegedly provided benefits to an official of the union which represented Boffa's employees. The defendant was charged with having used the mails to fraudulently deprive his employees of "1) the loyal, faithful and honest services of the union official; 2) economic benefits they enjoyed through rights guaranteed them by the National Labor Relations Act . . . and 3) economic benefits they enjoyed through rights they had under an existing collective bargaining agreement." \(^{115}\) The Third Circuit held that a RICO violation based on the predicate act of mail fraud could be established with the exception of the NLRA allegation. The court based its decision on the fact that the NLRA is a statute that is not punitive but remedial in nature, and that the exclusive jurisdiction to enforce the NLRA rested with the NLRB. \(^{116}\)

In another decision, a District Court in Florida went one step further, and ruled that a RICO claim could not be based on acts that were even arguably subject to section 7 or section 8 of the NLRA. \(^{117}\) In that case a union instituted a RICO action against an employer alleging as predicate acts that the employer had bribed its employees to decertify the union. The court held that the action was preempted by the NLRA. \(^{118}\) On the other hand, two of the allegations in Boffa were not clearly situations which were violating the NLRA. In Boffa, the Third Circuit allowed the RICO action to proceed on the basis of the fraudulent scheme to deprive employees of contract rights and the right to loyal and honest services of a union official. \(^{119}\) Boffa argued that these actions were also arguably prohibited by the NLRA, and thus should also be preempted, but the court rejected this argument. \(^{120}\) The court stated "that the 'arguably prohibited' nature of [Boffa's] conduct cannot exempt [him] from pros-

\(^{115}\) 688 F.2d at 923. See also United States v. Sheeran, 699 F.2d 112 (3d Cir.), cert. denied, 461 U.S. 931 (1983).

\(^{116}\) Id. at 928. In addition, the court held that "the absence of any criminal sanctions in Section 8 of the NLRA suggests that Congress did not contemplate that employers would be subject to criminal liability, even by operation of another statute, as a result of committing an unfair labor practice. Id.


\(^{118}\) Id. at 764. The court found that the employer's actions were clearly unfair labor practices and therefore could and should be remedied by the NLRA.

\(^{119}\) Id. at 764. The court found that the employer's actions were clearly unfair labor practices and therefore could and should be remedied by the NLRA.

\(^{120}\) The court held that a scheme to deprive employees of their interests in rights guaranteed by the NLRA could not proceed as a mail fraud case and thus could not be relied on as a predicate act in a RICO case. Boffa, 688 F.2d at 930.
execution under the mail fraud act,"\textsuperscript{121} and thus under RICO.

In addition, there have been decisions which have held that an arbitrator or a court in a Section 301\textsuperscript{122} action has jurisdiction to decide whether a work transfer or plant relocation is violative of established contractual rights even if the action was not an unfair labor practice.\textsuperscript{123} A work relocation decision could be arbitrable even if not bargainable and thus remedies could exist for conduct that is not violative of the NLRA.\textsuperscript{124}

In R.B. Electric v. Teamsters Local 569,\textsuperscript{125} the court refused to stay a union initiated arbitration in which the union alleged that the employer had violated the double breasted work preservation clause of the contract. The court held that as long as the arbitrator's decision would not usurp the jurisdiction of the NLRB to decide unit questions, the arbitration could proceed.\textsuperscript{126} If these types of actions are not preempted by the NLRA then perhaps analogous arguments can be maintained on the issue of RICO preemption.

If an employer's decision to relocate work during the term of a collective bargaining agreement is not clearly an unfair labor practice remediable by the NLRB, then the potential still exists to use the mail fraud statute to remedy the situation. Notwithstanding the one district court decision to the contrary,\textsuperscript{127} after Boffa, it is possible to use violations of the mail fraud statute as predicate acts when employers' actions defraud their employees of certain contractual or representational rights. This argument can be used if the relocation or work transfer takes place after a contract is in effect, during negotiations or after a bargaining representative has been certified. In both situations, employees would be denied the benefits of a union contract and union representation by an employer who is seeking to evade its legal obligations.

\textsuperscript{121} Id. at 933.
\textsuperscript{122} 29 U.S.C. § 185 (1982).
\textsuperscript{123} Teamsters Local 115 v. DeSoto, Inc., 725 F.2d 931 (3d Cir. 1984).
\textsuperscript{124} Id. In this decision, an employer unilaterally decided to close a plant and transfer the operations to existing plants at other locations. The union initiated an arbitration proceeding and filed § 8(a)(1) and § 8(a)(3) charges under the National Labor Relations Act. The NLRB dismissed the complaint holding that the decision to close the plant was not a mandatory bargaining subject and thus there was no violation of the Act. The arbitrator, on the other hand, found that the employer's actions violated the collective bargaining agreement. The Third Circuit Court of Appeals affirmed the arbitration decision and held that the decision of the NLRB finding that no unfair labor practices had been committed, did not require vacating the arbitrator's award.
\textsuperscript{125} 119 L.R.R.M. (BNA) 2821 (S.D. Cal. 1985).
\textsuperscript{126} Id. at 2825.
After the NLRB's *Milwaukee Spring II* decision, and its concurrent decisions on work transfers, it now appears that a relocation which is motivated by a desire to reduce labor costs is not even arguably prohibited by the NLRA. Therefore, such an action should not be exempt from prosecution under RICO if the prerequisites of this Act are satisfied.

V. THE POTENTIAL USE OF RICO BY UnIONS TO HELP IMPEDE THE FLOW OF RUNAWAY SHOPS

To begin this analysis, it is necessary to determine which of RICO's predicate offenses would be most suitable for use in the context of a plant relocation. The mail and wire fraud statutes appear to offer the greatest advantages. An indictable offense under these statutes requires a scheme or plan designed to defraud or to obtain money by false pretenses, the utilization of the mails or wires in the furtherance of the fraud, and a specific intent to defraud. Each use of the mails or wires constitutes a separate offense. It is not necessary, however, to prove that the misrepresentation actually was transmitted through the mail or wires, as long as there was some likelihood that the mails or wires were used to further the scheme to defraud or to obtain money by false pretenses.

The nature of fraud is also very broad, and there is a wide range of potential applications of these statutes. In one case the mail fraud statute was successfully used against a defendant who had mailed false documents to a state election committee to conceal the fraudulent conversion of campaign funds. Another example of

128. See cases cited supra notes 99, 110.
129. 18 U.S.C. §§ 1341, 1343 (1982). The elements of a mail or wire fraud claim are essentially the same except that one involves the use of the mails and the other the use of telephone, telegraph, television or radio.
133. In the case of Isaacs v. United States, 301 F.2d 706 (8th Cir.), cert. denied, 371 U.S. 98 (1962), the court noted:
   "We recognize that the forms of fraud are as multifarious as human ingenuity can devise; that courts consider it difficult if not impossible to formulate an exact definition thereof; and that each case must be determined on its own facts. In general, and in its generic sense, fraud comprised concealment involving breach of legal or equitable duty and resulting in damage to another.
   Id. at 713.
134. In United States v. Curry, 681 F.2d 406 (5th Cir. 1982), the court held that the
a mail fraud violation involved a scheme to use the services of government employees to perform private services for the defendant. In *Seville Industrial Machinery v. Southmost Machinery Corp.*, a RICO violation was based on predicate acts of mail fraud which involved the use of the mails to induce a contractual relationship through misrepresentations. Similarly, in *Alexander Grant & Co. v. Tiffany Industries*, a civil RICO action was brought by an accounting firm against one of its clients on the basis of mail and wire fraud. The accounting firm alleged that the client fraudulently sought to obtain favorable audits which enabled it to remain in business and caused the accounting firm to provide unnecessary and extensive services.

Schemes to defraud can also encompass intangible losses. For example, in *United States v. Louderman*, the wire fraud statute was applied to a deprivation of a citizen's right to privacy when the defendant fraudulently obtained confidential information from the telephone company.

Because each separate mailing constitutes a separate violation, any two individual mailings will satisfy the pattern requirement, even if they pertain to only one scheme to defraud. The possibilities for an imaginative litigator are virtually endless.

In the context of runaway shops and double breasted operations, the mail and/or wire fraud statutes could be used in the following manner. In most cases, when a company decides to relocate its operations from a union to a non-union site, the usual, although unstated, motive is to evade contractual obligations. To accomplish the relocation, an employer will have to notify employees and the union, hire movers and make a multitude of other arrangements. Such notification or arrangements are usually accomplished by use of the mails or wires. As was stated earlier, to establish a mail or wire fraud violation, it is not necessary to allege or prove that an actual misrepresen-

language of the mail fraud statute is sufficiently flexible to encompass any conduct which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.

135. See *United States v. Pintar*, 630 F.2d 1270 (8th Cir. 1980). In *Pintar* the court held that such a scheme, whether it involves a government agency or a private employer, which deprives the employer of the loyal, honest and faithful services of the employees can form the basis of a mail fraud violation.

137. 742 F.2d 408 (8th Cir. 1984).
tation is transmitted by mail or wire. It is sufficient if the mails or wires are used in the furtherance of a scheme. Fraud may be established when employees are deprived of contractual benefits, such as wages, vacations, and fringe benefits. In Boffa, the court held that this type of fraud is actionable under the mail fraud statute. 141

In the case of McClendon v. Continental Group, Inc., 142 a RICO action was instituted against an employer based on the fraudulent deprivation of employees’ pension rights. The plaintiffs, former employees of Continental Group, alleged that the employer’s scheme was carried out by use of the mails. The defendant argued that the plaintiffs failed to allege specific misrepresentations or omissions and, therefore, their action should be dismissed for failure to satisfy the requirements of the mail fraud statute. The court rejected this argument. 143 The court stated that a fraud could exist in a situation such as this one when “an industrial organization breaches its statutory duty not to deprive employees of their pension benefits based upon such employees’ status with respect to those benefits.” 144

The holdings and dicta of Boffa and McClendon can be used as effective arguments to stop a runaway shop. If the employer uses the mails or wires on at least two occasions to notify the union, to lay-off the employees, or to make arrangements for its move, the actions will fall within the ambit of the mail or wire fraud statute because the employer’s actions will have the effect of depriving and defrauding employees of contractual rights. The employer’s intent, though usually unstated, is to evade its contractual obligations and

141. 688 F.2d 919 (3d Cir. 1982) The court stated: “We believe that a scheme to defraud employees of these economic benefits [collective bargaining agreement benefits] such as wages and seniority rights, lies squarely within the ambit of the mail fraud statute . . . . Although they may have been obtained as a result of employees’ exercise of rights guaranteed by section 7 of the NLRA, these benefits are contractual, not statutory, in nature. While deprivation of section 7 may be vindicated solely through the procedures established for unfair labor practice disputes, we believe the broad language of the mail fraud statute proscribes schemes to deprive an individual of economic benefits that are contained in a collective bargaining agreement.” Id. at 930.

142. 6 EBC 1113 (D.C.N.J. 1985). In McClendon, the employer laid off employees just as they approached the time when they would have been eligible to receive various pension benefits.

143. The Court stated:
A course of conduct may comprise a scheme or artifice to defraud, even absent particular fraudulent statements or omissions . . . .
[The mail fraud statute generally has been available to prosecute a scheme involving deception that employs the mails in its execution and is contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing.
Id. at 1124-25.

144. Id. at 1125.
to seek a non-union location with lower labor costs.

In *Boffa*, the court held that a mail fraud action could also be based on a scheme to defraud employees of fiduciary obligations owed to them by their union representatives.146 *Boffa* bribed a union representative to secure his cooperation in a "labor-switching" scheme. The decision provides a persuasive argument that union members have a right to the faithful services of their elected representatives in all circumstances. If an employer relocates to evade contractual obligations or the union, the employees will be deprived of the services of their union representatives. Although an unemployed individual can usually remain a member of a union, the union will no longer be able to effectively represent that individual. This argument can also be used to strengthen a union's assertion in a situation where an employer relocates the work either after a contract's expiration or before an initial contract is negotiated.

In light of the above and the express language in RICO, that its provisions "shall be liberally construed to effectuate its remedial purposes,"147 it is the opinion of this author that RICO can be used to help impede the flow of runaway shops. The Supreme Court's *Sedima* decision will have the effect of expanding RICO's uses even further now that certain previously imposed limitations have been finally and formally removed.148 In fact, Justice Marshall, in his dissent, stated that "[t]he Court's interpretation of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions."148

145. The court in *Boffa* stated:
We believe that the [Labor Management Reporting and Disclosure Act] established as a matter of federal law, union members' right to the honest and faithful services of union officials. . . . We therefore believe that a scheme to defraud employees of the loyal, faithful, and honest services of their union official alleges a crime within the scope of the mail fraud statute.
688 F.2d at 931.
147. The dissent in *Sedima II* stated:
Under the Court's opinion today, two fraudulent mailings or uses of the wires occurring within ten years of each other might constitute a pattern of racketeering activity . . . leading to civil RICO liability . . . . The effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering because in recent years the Courts of Appeals have tolerated an extraordinary expansion of mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal and civil law.
148. *Id.*
VI. Remedies

RICO is a particularly attractive statute because of its available remedies. A successful plaintiff can collect treble damages for proven violations of Section 1962. 149 The statute also provides for equitable relief. 150 In addition, the Attorney General may institute proceedings. 151 The government has rarely invoked the civil provisions of this Act, however, it clearly has the authority to do so. 152 In 1982, an action which has been the focus of much debate was instituted against the officers of a New Jersey Teamsters Local. 153 The complaint in that case requested that the officers be divested of their posts and enjoined from further participation in or contact with the local. It also requested the appointment of a trustee to manage the affairs of the union and its employee benefit plans. These actions were thought to be necessary because the local had allegedly been controlled and infiltrated by members of an organized crime family. The court granted the requested equitable relief. 154 However, the relief was stayed pending appeal. 155

It is also well established that equitable relief is available to the government under section 1963 in RICO criminal actions. 156 However, the courts have not yet resolved the issue of whether section 1964(a) applies to actions brought by private plaintiffs. While some courts have assumed that the equitable remedies, which include, but are not limited to, injunctions and divestitures, are available in private civil suits, 157 others have flatly rejected this proposition. 158

149. 18 U.S.C. § 1964(c)(1982); see supra note 40 for text.
150. Id. § 1964(a); see supra note 39 for text.
151. Id. § 1964(b); see supra note 39 for text.
154. Id. at 327-28.
155. Id.
tainly, if such relief is available, unions could have the power to actually enjoin a plant relocation if a RICO violation can be established. In either event, the potential for an award of treble damages, attorney's fees and costs might have the effect of convincing an employer to think twice before deciding to "runaway."

VII. CONCLUSION

The problem of runaway shops is a real one and unions need to take affirmative steps to combat it. Today's NLRB appears to be giving employers a free hand with respect to plant relocations regardless of their motives. RICO is a powerful weapon and once its intricacies are fully understood, it can be effectively used by the labor practitioner in a variety of situations. While section 1961 of RICO sets forth well over thirty predicate offenses, the two that provide the most potential for use in this context are the mail and wire fraud statutes. When one considers the breadth of these laws and the multitude of actions which have been successfully maintained under them, it becomes clear that the potential is vast.

If during a plant relocation, an employer uses the mails or wires on two occasions to help accomplish its purpose, and if the effect of such a relocation would be to deprive employees of contract rights and benefits and the services of their union representatives, the basis of a RICO action exists. The union or employee plaintiff must establish that the motive behind the move is to enable the employer to evade its contractual or collective bargaining obligations. As this is usually the motivation behind such a move, proving this fact will not be a very difficult task. A violation of the mail and wire fraud statutes can be established even without the transmittal of any misrepresentation by mail or wire; as long as the mails or wires are used in furtherance of the scheme. Legitimate arguments exist to support such an action. Runaway shops and double breasted operations continue to pose a threat to the entire structure of the labor movement and unions must avail themselves of all possible solutions to prevent them.