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Notes

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INTRODUCTION

In 1935, Congress enacted the National Labor Relations Act\(^1\) (NLRA), a statutory scheme designed to facilitate industrial peace.\(^2\) The NLRA created certain rights and duties pertaining to employees, employers and labor organizations in the collective bargaining process,\(^3\) and established the remedies available for violations of such rights.\(^4\)

The NLRA also established the National Labor Relations Board (NLRB), a quasi-judicial administrative agency whose purpose is to decide what conduct violates the NLRA and to provide an appropriate remedy.\(^5\) The NLRB’s jurisdiction under

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\(^1\) See 29 U.S.C §§ 151-169 (1982).


The basic principle of the NLRA is to be found in its section 7, granting to employees the right to form labor organizations, to deal collectively through such organizations regarding terms and conditions of employment and to engage in concerted activities in support of these other rights. The statute can best be understood as an effort by the Congress to create the conditions of industrial peace in interstate commerce by removing obstacles to—indeed, encouraging—the formation of labor unions as an effective voice for the individual worker.


\(^4\) Examples of remedies available to the NLRB are (1) cease and desist orders; (2) employee reinstatement; and (3) back pay awards. Id. at § 160(c). See infra notes 41-46 and accompanying text.

\(^5\) See 29 U.S.C. § 153(a) (1982) (establishing the NLRB); Id. at § 160 (empowers NLRB to prevent violations of the NLRA and provides for remedies).
the Act is exclusive. Thus, any "unfair labor practice" charge may be resolved only by the NLRB. This exclusive jurisdiction preempts the states' authority to regulate conduct arguably controlled by the NLRA.\footnote{6}

In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)\footnote{9} to strengthen the hand of the federal government in combating organized crime.\footnote{10} RICO provides both criminal sanctions\footnote{11} and a civil remedy for private plaintiffs whose businesses or property are injured by violations of the statute.\footnote{12}

While these two federal statutory schemes are virtually in-

\footnote{6} 29 U.S.C. § 158 (1982) lists unfair labor practices. Unfair labor practices may be committed by employers (§ 158(a)) as well as unions (§ 158(b)). For example, both employers and unions are prohibited from interfering with or restraining employees in the exercise of their § 157 rights. \textit{Id.} at § 158(a)(1), (b)(1).

\footnote{7} See id. at § 160(a); Amalgamated Util. Workers v. Consolidated Edison, 309 U.S. 261 (1940) (The original codification of this section made this exclusivity express. However, after certain amendments contained in the LMRA provided for federal district court jurisdiction over specified causes of action, the word "exclusive" was deleted. Nonetheless, recognizing congressional intent, courts have consistently upheld this exclusive jurisdiction.). See, e.g., Butcher's Union v. SDC Inv., Inc., 631 F Supp. 1001, 1006 (E.D. Cal. 1986) (explaining the exclusive jurisdiction of the NLRB over unfair labor practice disputes).

There are two exceptions to the NLRB's exclusive jurisdiction. See 29 U.S.C. §§ 186-187. \textit{(Labor Management Relations Act (LMRA) § 302 provides jurisdiction to federal courts to hear complaints that involve illegal payments made to union representatives by employers. LMRA § 303 makes § 8(b)(4) of the NLRA (which prohibits secondary boycotts, recognition and work assignment strikes) remediable in federal district court. LMRA § 303 was designed to deter unions from conduct that Congress deemed particularly objectionable by subjecting the unions to monetary damages. See also R. Gorman, supra note 2, at 291.}

\footnote{8} See infra notes 54-69 and accompanying text.

\footnote{9} 18 U.S.C. §§ 1961-1968 (1982); see also infra notes 70-97 and accompanying text.


It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

\textit{Id.}

\footnote{11} 18 U.S.C. § 1963 (1982) provides for fines up to $25,000 and/or imprisonment for up to 20 years.

\footnote{12} 18 U.S.C. § 1964(c) (1982) provides treble damages for any person proving an injury to business or property by reason of a violation of the act.
dependent of each other, certain conduct by employers or labor organizations may fall within the proscriptions of both the NLRA and RICO. Because the NLRA places unfair labor practices within the exclusive jurisdiction of the NLRB, the question arises whether Congress intended RICO to apply to such labor-management conflicts.

Resolution of the potential conflict between the NLRB’s exclusive jurisdiction to remedy labor disputes and RICO’s generic, all-encompassing applicability requires thoughtful application of each statute to the facts of a given dispute. The congressional intent behind each of these two statutes should not be thwarted by the application of the other. As this Note will demonstrate, reconciliation requires ascertaining the type of injury the plaintiff has allegedly incurred and then focusing on the defendant’s conduct to determine whether the NLRA or RICO provides the appropriate remedy. To perform this analysis, the rights and remedies provided by each of the statutes will be explored.

I. THE NATIONAL LABOR RELATIONS ACT

A. Background of the NLRA

Prior to the enactment of the NLRA, the courts treated concerted activities by employees seeking increased wages or improved working conditions with hostility. During the 19th century, for example, such activities were sometimes deemed

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14 See, e.g., infra notes 156-77 and accompanying text (A deprivation of property or contractual rights provided by a collective bargaining agreement may constitute both unfair labor practices under the NLRA and a Pattern of Racketeering Activity under RICO).

15 See infra notes 48-69 and accompanying text (discussing the balance between federal and state regulation of labor-management conflicts); see also infra notes 170-96 and accompanying text (discussing whether RICO should be interpreted as an implied repeal of the NLRB’s exclusive jurisdiction over labor-management disputes).

16 The NLRA is a complicated federal statutory scheme. The contents of this section purport to be only a broad overview of the provisions relevant to the broader statutory comparison of the NLRA and RICO.

17 See R. GORMAN, supra note 2, at 1-3.
criminal conspiracies which restrained trade and damaged employers.18 Concerted employee activities were often enjoined by federal courts pursuant to anti-trust laws.19

Congressional recognition of judicial hostility to the interests of laborers prompted the passage of section 20 of the Clayton Act of 1914.20 Section 20 placed certain concerted activities outside the reach of the Sherman Anti-Trust Act21 by making them nonenjoinable by the courts.22 Later, following the Supreme Court's narrow construction of section 20, Congress enacted the Norris-LaGuardia Act, which protected the employees' right to strike and provided additional guarantees of fairness to laborers.23

While the Norris-LaGuardia Act limited the federal government's ability to inhibit employees seeking collective bargaining concessions, Congress subsequently enacted additional legislation to protect employees' rights to self-organization.24 In 1935, Congress passed the National Labor Relations Act (NLRA), also known as the "Wagner Act."25 This statute, as amended,26 is

18 Id. at 1.
19 See, e.g., Loewe v. Lawlor, 208 U.S. 274 (1908). In Loewe, the United Hatters of North America, in attempting to unionize a hat manufacturer, organized a strike and a boycott of the manufacturer's hats. The Court found this to violate the Sherman Antitrust Act as an obstruction of the free flow of commerce and a restriction of a trader's ability to engage in business. See also 15 U.S.C. §§ 1-7 (1982).
21 15 U.S.C. §§ 1-7 (1982). The Sherman Act was intended to prevent conspiracies in restraint of commerce and made such conspiracies illegal.
22 See Duplex Printing Press Co. v. Deering, 254 U.S. 443, 472 (1921) (The Court strictly construed § 20 of the Clayton Act, which forbids injunctions against conduct growing out of a dispute over terms of employment. The Act was held to cover only specific employees' grievances, and not union conduct in which no specific industrial controversy exists.). Id.
24 See id. at § 151 (statement of findings and policies behind enactment of NLRA).
26 The NLRA has been amended by both the Labor Management Relations Act, 29 U.S.C. §§ 141-197 (1982), and the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1982). From this point forward, all references to the NLRA will refer to the NLRA, as amended, i.e., its present form.
the framework for today's federal labor law.  

B. Unfair Labor Practices

The NLRA regulates "employers" who operate businesses affecting interstate commerce. "Employees" covered under the Act include all persons working for such employers, except those specifically excluded by the Act. These statutory "employers" and "employees" are subject to the rights and duties contained in the NLRA and their conduct must conform to its provisions.

The rights of employees under the NLRA are enumerated in section 7 of the Act. For instance, under that section, employees have the right to bargain collectively. Section 8(a)(1) of the Act makes it an "unfair labor practice" for an employer to violate these employee rights. Section 8(a) also proscribes other
types of conduct by employers.\textsuperscript{34} For example, Section 8(a)(5) of the Act forces employers to bargain in good faith with the collective bargaining agent of their employees.\textsuperscript{35}

As originally codified, the NLRA regulated only employers' behavior.\textsuperscript{36} However, the Labor Management Relations Act

\textsuperscript{34} See id. at § 158(a)(2)-(5).

(a) It shall be an unfair labor practice for an employer—

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: \textit{Provided}, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title [NLRA § 6], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: \textit{Provided}, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection [NLRA § 8(a)] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title [NLRA § 9(a)], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title [NLRA § 9(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: \textit{Provided further} That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title [NLRA § 9(a)].

\textit{Id.} (partial emphasis added); see also B. \textsc{Schwartz} & R. \textsc{Koretz}, supra note 25, at 288-94 (discussion of policies behind the enactment of NLRA § 8(a)).


\textsuperscript{36} See B. \textsc{Schwartz} & R. \textsc{Koretz}, supra note 25, at 297 (Congress felt no showing had been made that employers needed protection in dealing with employees.).
(LMRA) added section 8(b) to the NLRA, which provided a list of "unfair labor practices" applicable to collective bargaining agents. Thus, the NLRA now regulates both employers and unions in the collective bargaining process by preventing either from acting in derogation of employees' rights under the Act.

C. Remedying Unfair Labor Practices

Section 3 of the NLRA establishes the National Labor Relations Board (NLRB), which is charged with the responsibility of administering the Act. Section 10 of the NLRA contains the procedural framework by which the NLRB remedies unfair labor practices.

Upon receiving an unfair labor practice charge from either an employer or a union, the General Counsel of the NLRB has the power to issue an unfair labor practice complaint against the charged party. The General Counsel's decision concerning the issuance of complaints is non-reviewable by either the NLRB or the courts, except for cases in which there is a claim of arbitrariness or bad faith on the part of the Board. Once a complaint is issued, the NLRB will determine whether

38 B. Schwartz & R. Koretz, supra note 25, at 562 (Congress felt that union practices, including some forms of labor strikes and boycotts, had become sufficiently damaging to the public to merit some federal regulation.).
40 See id. at §§ 159-60. The NLRB is charged with policing the conduct of union representation elections and remedying unfair labor practices. This discussion only pertains to the latter.
41 Id. at § 160 (prevention of Unfair Labor Practices).
42 R. Gorman, supra note 2, at 7 ("An unfair labor practice case is initiated by filing a charge in the regional office [of the NLRB] where the alleged wrongdoing has occurred.").
43 See 29 U.S.C. § 153(d) (1982). The General Counsel of the Board is appointed by the President and has final authority over the investigation and prosecution of all complaints received by, and charges issued by the Board.
44 See id. at § 160(b). The Board or any designated agent or agency of the Board has the power to issue a complaint which states the charges and contains a notice of hearing.
45 See Vaca v. Sipes, 386 U.S. 171 (1967). The Court held that if the Board's decision not to take the grievance to arbitration was not arbitrary or made in bad faith, the decision was unreviewable.
the conduct constitutes an unfair labor practice, and if so, the appropriate remedy.

D The Balance of Federal and State Regulation of Labor-Management Conflicts

Although Congress created the NLRB as an exclusive, expert administrative body to develop national labor law policy, it omitted criminal sanctions and civil remedies from the NLRA. The Act was not intended to remedy violence or fraud by employers or unions. Existing state law definitions of criminal conduct were deemed sufficient to regulate the behavior of employers and unions.

The NLRA’s thrust is remedial rather than punitive, as demonstrated by the means provided to the NLRB to remedy unfair labor practices. These “make whole” remedies include cease and desist orders, reinstatement orders and orders requiring payment of back pay to wrongfully terminated employees. While the NLRB cannot directly enforce these remedies, any court of appeals of the United States may order compliance with the Board’s order.

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47 See R. Gorman, supra note 2, at 291; see, e.g., Garner v. Teamsters, Chauffers and Helpers Local Union No. 776, 346 U.S. 485, 490-91 (1953).
48 Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

Id., see infra notes 55-69 and accompanying text.
50 See B. Schwartz & R. Koretz, supra note 25, at 298 (state law regulation of crimes and torts deemed sufficient); see also A. Goldman, LABOR LAW AND INDUSTRIAL RELATIONS IN THE UNITED STATES OF AMERICA ¶ 98 (1979).
51 See B. Schwartz & R. Koretz, supra note 25, at 298; cf. A. Goldman, supra note 49, at ¶ 754 (Actions in state courts to remedy violence and other torts are available if the state remedy does not conflict with federal labor policy.).
53 See id. at § 160(c).
54 See id. at § 160(e).
Recognizing the delicate balance between federal and state regulation of conflicts occurring in labor-management disputes, courts have applied the "preemption doctrine" to draw the line between appropriate federal and state jurisdiction and remedies. Under the preemption doctrine, as applied to the labor law context, states may not regulate conduct that is either protected by section 7 or prohibited by section 8 of the NLRA. For example, a state has no jurisdiction to award an employer damages arising out of picketing by employees. As the Court stated in *San Diego Building Trades Council v. Garmon*, "when the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting."

In recognition of the balance of federalism contemplated by Congress, states are prohibited from regulating labor activities that are neither prohibited nor protected by the NLRA, but represent conduct Congress intended to leave available to employers and unions as economic weapons. For example, in *International Association of Machinists v. Wisconsin Employment Relations Commission*, a union pressured an employer by having its members refuse overtime work. This activity was neither protected nor prohibited by the NLRA. The employer filed an unfair labor practice charge with the NLRB, but it was

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54 See supra notes 48-50 and accompanying text (In order for federal regulation of unfair labor practices to be uniform, individual states must not make laws that impact on the same subject matter as the NLRA.).
55 See Black's Law Dictionary 1060 (5th ed. 1979) (Certain federal laws preempt or take precedence over certain state laws.).
56 See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959). The Court prohibited the state from awarding damages to employers for economic injuries resulting from the peaceful picketing of their plants by unauthorized labor unions. In so doing, the Court stated that this activity was subject to the NLRA, and therefore the states must defer to the NLRA in these matters. Id.
57 Id.
59 Id. at 243.
62 Id. at 134.
63 Id. at 135.
dismissed by the NLRB Regional Director. Consequently, the employer sought and received relief from the state labor board.64 The Supreme Court, however, reversed the state's action, holding that Congress intended some conduct "to be controlled by the free play of economic forces."65

States, however, may exercise legitimate control over some conflicts arising in the labor law context. First, the application of state criminal sanctions is not preempted by the NLRA when employers or unions violate state criminal statutes.66 Also, state tort remedies are available to those individuals damaged by tortious conduct.67 In other words, the NLRA has not been construed to prevent the states from regulating "conduct touch[ing] interests deeply rooted in local feeling and responsibility"68 or in which the "activity regulated [is] a merely peripheral concern" under the NLRA.69

II. RACKETEERING-INFLUENCED AND CORRUPT ORGANIZATIONS

A. Overview of History and Purpose of RICO

RICO70 was enacted in 1970 as Title IX of the Organized Crime Control Act (OCCA).71 As its title suggests, the Act was designed to combat the pervasive influence of organized crime.72 Congress was especially concerned about the harmful effects to the national economy caused by the infiltration and control of legitimate businesses and labor organizations by organized crime.73

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64 Id. at 135-36.
65 Id. at 144.
66 See R. Gorman, supra note 2, at 216 (perpetrator of a state-law crime not immunized from criminal liability merely because conduct occurs in the context of a labor dispute).
68 San Diego Bldg. Trades Council, 359 U.S. at 244.
69 Id. at 243.
72 See supra note 10.
While the overriding purpose of the legislation is abundantly clear from its title and history, Congress did not necessarily intend to limit RICO's application to organized crime.74

The OCCA, including RICO, passed the Senate almost unanimously on January 23, 1970.75 The bill was referred to the House Committee on the Judiciary on January 26, 1970.76 The House passed the bill in 1970,77 but not before adding a private right of action for persons injured by RICO-type conduct.78 The Senate viewed the House amendments to the bill as minor and adopted them by voice vote and without a conference.79 The legislation was signed into law by President Nixon on October 15, 1970.80

B. RICO: Criminal Prohibition of Racketeering

Title IX of the OCCA, commonly known as "RICO," prohibits: (1) any person from investing income obtained from a pattern of racketeering activity into enterprises operating in interstate commerce,81 (2) any person from obtaining an interest in an enterprise operating in interstate commerce through a pattern of racketeering activity or collection of an unlawful debt,82 and (3) any person from conducting an enterprise's affairs through a pattern of racketeering activity 83

A " 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after [Oct. 15, 1970] and the last of which occurred within ten years

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74 See 116 Cong. Rec. 18,913-14 (Senator McClellan, the author of S. 30, the bill which became the OCCA, made it clear that the act should not necessarily be limited in application to organized crime.).
75 Id. at 952, 972 (The vote was 73 to 1.).
76 Id. at 1103.
77 Id. at 35,363.
78 See 18 U.S.C. § 1964(c) (1982). "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 a reasonable attorney's fee." Id.
79 See 116 Cong. Rec. at 36,280-96.
80 Id. at 37,264.
82 Id. at § 1962(b).
83 Id. at § 1962(c).
(excluding any period of imprisonment) after the commission of a prior act of racketeering activity. Racketeering Activities are numerous, including both state and federal crimes. These crimes are known as "predicate acts." Conspiring to violate RICO is also proscribed by the Act.

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84 See id. at § 1961(5); see also Comment, The Pattern Requirement of Civil RICO, 74 KY. L.J. 623 (1985-86).

85 18 U.S.C. § 1961(1) (1986) provides as follows:
(1) 'Racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, 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), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), section 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), (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealing, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

Id.

86 In other words, the violations of other substantive laws are the acts upon which the substantive RICO violation is predicated. For the purpose of this Note, at least, it is important to remember that the predicate acts are independent crimes which are subject to traditional prosecution. The crime of "RICO" is the use of the proscribed conduct in a pattern and constitutes a separate offense.

The criminal penalties for violating RICO include both fines and imprisonment. The Act also provides for forfeiture of any interest acquired in violation of the statute.

C. The Civil Remedy For RICO Violations

The application of the RICO statute is not limited to criminal prosecution by the United States. Specifically, any person in-
jured in his business or property due to RICO-type conduct may bring suit in a federal district court for treble damages, costs and reasonable attorney's fees. Thus, the statute's broad reach is not necessarily limited by the prosecutorial discretion of the United States Department of Justice.

The "civil RICO Action" has flourished during the last five years as lawyers have become more aware of the substantial remedies available under the statute. Furthermore, the Supreme Court's first pronouncement on civil RICO, Sedima, S.P.R.L. v Imrex Company, Inc., "fueled the fire" by eliminating two defenses upon which civil RICO defendants had previously relied to persuade lower courts to dismiss civil RICO claims. First, the Court held that it is not necessary for a defendant to have been convicted of a predicate act for a civil RICO claim to exist. Second, the Court struck down the Second Circuit's requirement that the plaintiff's injury must have arisen from a RICO-type violation and not simply from one of the predicate acts. Thus,

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 [18 USCS § 1962] 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 a 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 [18 USC §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Id.


See Milner, A Civil RICO Bibliography, 21 C.W.L.R. 409 (1984-85) (listing of cases, statutes and periodicals pertaining to Civil RICO).


Justice White writing for a majority of five stated: "Had Congress intended to impose [the requirement of a criminal conviction] there would have been at least some mention of it in the legislative history, even if not in the statute." Id. at 3282.

Given that 'racketeering activity' consists of no more and no less than commission of a predicate act, § 196(1), we are initially doubtful about a requirement of a 'racketeering injury' separate from the harm from the
the Court helped clear the path for civil litigants who might wish to use "civil RICO" to redress injuries traditionally subject to ordinary tort or fraud claims.97

D. The Potential Conflict Between RICO and the NLRA

Given the potential for the expansive application of both criminal and civil RICO, the question arises to what extent Congress intended this statute to apply to labor-management disputes. As discussed previously, Congress intended the NLRA to be the exclusive remedial scheme for violations of the Act.98 Thus, if employees are deprived of their NLRA rights by a pattern of racketeering activity, should RICO, the NLRA, or both statutes apply to such a violation?

In the criminal context, this potential for conflict may be avoided to some extent by the United States attorney's use of prosecutorial discretion.99 No such discretion exists, however, to prevent employers, employees and unions from using a civil RICO action to circumvent the otherwise exclusive jurisdiction of the NLRB.100 In Sedima, Justice Marshall discussed civil predicate acts.

There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement.

Id.

97 See id. at 3294-95 (Marshall, J., dissenting).
In the context of civil RICO, however, the restraining influence of prosecutors is completely absent. [P]rivate litigants have no reason to avoid displacing state common-law remedies. [I]n fact [they] have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud. The civil RICO provision consequently stretches the mail and wire fraud statutes to their absolute limits and federalizes important areas of civil litigation that until now were solely within the domain of the states.

Id. But see Comment, supra note 84, at 649 (The author of the Comment opines that the "pattern requirement," 18 U.S.C. § 1961(5), may be used to hold back the imminent flood of civil litigation yet to come.).

98 See supra notes 6-8, 47 and accompanying text.


100 Because civil RICO is available to private plaintiffs, the U.S. Attorney's office and its use of prosecutorial discretion is not impacted.
RICO’s potential encroachment into well-established federal remedial schemes:

In addition to altering fundamentally the federal-state balance in civil remedies, the broad reading of the civil RICO provision also displaces important areas of federal law. For example, one predicate offense under RICO is “fraud in the sale of securities.” 18 U.S.C. § 1961(1). By alleging two instances of such fraud, a plaintiff might be able to bring a case within the scope of the civil RICO provision. It does not take great legal insight to realize that such a plaintiff would pursue his case under RICO rather than do so solely under the Securities Act of 1933 or the Securities Exchange Act of 1934, which provide both express and implied causes of action for violations of the federal securities laws.\(^{101}\)

Justice Marshall also recognized the potential for circumventing other federal remedial schemes through the use of “civil RICO actions alleging mail or wire fraud,”\(^{102}\) thus presaging the danger civil RICO may pose to the integrity of the NLRA. By drafting complaints to comply with civil RICO, private plaintiffs might be able to obtain substantial relief in the form of treble damages, costs and attorney’s fees, which would not otherwise be available under the NLRA for conduct which constitutes an unfair labor practice under the Act.

III. RICO AND THE NLRA. WHEN SHOULD RICO APPLY?

A. Background: Federal Crime and the NLRA

Whether and to what extent federal criminal statutes should apply to labor-management relations is not a new issue. In 1973, the Supreme Court decided United States v Enmons,\(^{103}\) in which the Hobbs Act\(^{104}\) was held inapplicable to legitimate labor dis-

\(^{101}\) See Sedima, 105 S. Ct. at 3294-96.

\(^{102}\) Id. at 3295.

\(^{103}\) 410 U.S. 396 (1973).

\(^{104}\) 18 U.S.C. § 1951(b)(2) (1982). The statute provides, in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or
In *Enmons*, union employees of the Gulf States Utilities Company were involved in a strike. Two union members were indicted under the Hobbs Act for committing acts of physical violence and destroying company property. These acts of violence were allegedly committed to persuade the company to pay higher wages.\(^\text{105}\)

The government argued that acts of violence perpetrated to obtain higher wages from an employer clearly constituted extortion.\(^\text{107}\) "Extortion" is defined by the Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear."\(^\text{108}\)

The Court held that the Hobbs Act did not apply in the labor context when it would be impossible to determine if the use of violence was "wrongful" without also having to decide whether the goal of obtaining higher wages was "wrongful."\(^\text{109}\) The Court stated: "'wrongful' has meaning in the Hobbs Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property."\(^\text{110}\)

Because applying the Hobbs Act to labor violence would place the federal government into the position of policing the conduct of strikes, the Court deemed the language of the Hobbs Act insufficient to work such a significant alteration of the federal-state balance of labor-management regulation.\(^\text{111}\)

Implicit in the Court's decision was the intent to preserve the regulatory scheme contained in the NLRA. Congress made it clear that federal regulation of the labor-management process would be limited to enforcing the rights and duties contained in

\(^{105}\) *Enmons*, 401 U.S. at 396-99.

\(^{106}\) *Id.* at 398. The acts of violence included firing rifles at company transformers, draining oil from transformers and blowing up a transformer substation.

\(^{107}\) *Id.* at 399.


\(^{109}\) *Enmons*, 410 U.S. at 400.

\(^{110}\) *Id.*

\(^{111}\) *Id.* at 411.
the NLRA, while the States would maintain their traditional jurisdiction over criminal and tort law. Since Congress obviously has the ability to increase the federal government's role, the Court held that such an intent must be clear from the wording of the statute or legislative history. Therefore, the Court was reluctant to interpret a subsequently enacted criminal statute as expanding federal control of labor-management relations vis-a-vis the States.

One year after Enmons, the Second Circuit, in United States v DeLaurentis, was faced with deciding whether a federal criminal statute that protected citizens from deprivations of federal rights should also include deprivations of rights provided by the NLRA. Specifically, the issue was whether 18 U.S.C. section 241, an 1870 civil rights statute, could render violations of the NLRA criminal.

Section 241 prohibits conspiracies to deprive a citizen of any right secured to him by the laws of the United States. Section 7 of the NLRA provides employees with the right not to participate in unions. Thus, threats of violence and other pressure applied by two or more union members to coerce non-union employees into supporting union goals could fall within the literal proscription of the Conspiracy Statute. At the same time, such union conduct would violate section 8(b)(1) of the NLRA.

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112 See supra notes 47-60 and accompanying text.
113 See Enmons, 410 U.S. at 411.
114 491 F.2d 208 (2d Cir. 1974).
115 Id. at 210.
116 Id. For the text of 18 U.S.C. § 241, see infra note 117.
If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having to exercise the same;
They shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
118 See supra note 31.
119 29 U.S.C. § 158(b)(1) (1982), added by the Labor Management Relations Act in 1947, forbids unions from violating this right. The statute provides, in pertinent part:
(b) It shall be an unfair labor practice for a labor organization or its
The *DeLaurentis* court, partially relying on *Enmons*, held that the rights specified in section 7 of the NLRA may only be vindicated by the NLRB. The court recognized that Congress did not envision criminal penalties for violations of the NLRA. In fact, the legislative history of the NLRA indicates that Congress specifically decided not to allow civil damage suits for violations of NLRA rights. Citing this legislative history, the *DeLaurentis* court held, "[i]t seems unlikely that a Congress that was not prepared to allow civil damage suits in these circumstances intended the same conduct to constitute a federal crime punishable by up to ten years in jail and a heavy fine." The court also noted that Congress had expressly provided a civil cause of action against unions who engaged in secondary boycotts. This indicated that Congress knew how to provide civil actions when it saw the need. Therefore, the court concluded "that Congress would not silently import sweeping criminal liability into the regulation of labor relations."

These cases illustrate judicial respect for Congress' decision to vest the NLRB with exclusive jurisdiction over NLRA violations. The remedial, non-punitive structure of the NLRA and

agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title or (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances.

*Id.*

120 *DeLaurentis*, 491 F.2d at 211.

121 *Id.* at 213.

122 See *id.*

123 *DeLaurentis*, 491 F.2d at 213.

124 See 29 U.S.C. § 187 (1982) (This statute provides a cause of action for damages in federal district court for violations of 29 U.S.C. § 158(b)(4) (1982). Normally violations of section 158 are exclusively remedied by the NLRB. This statute is an exception to the NLRB's exclusive jurisdiction over unfair labor practice claims.).

125 See 29 U.S.C. § 158(b)(4) (1982) (prohibiting labor organizations from pressuring neutral business entities, with whom the labor organizations have no dispute, from doing business with the employer from whom the labor organization is attempting to force concessions); see, e.g., *National Woodwork Mfg. Ass'n v. NLRB*, 386 U.S. 612 (1967) (union pressure intended to influence secondary employer into terminating business relationship with primary employer is prohibited by 29 U.S.C. § 158(b)(4)).

126 *DeLaurentis*, 491 F.2d at 214.

127 See, e.g., *id.* at 213 ("Courts, in a variety of ways, have emphasized that
its lack of civil or criminal penalties make the application of federal criminal statutes questionable. The exclusivity of the NLRB's jurisdiction to remedy unfair labor practices was recognized in DeLaurentis even though another federal statute arguably applied. The same type of analysis and the same deference to congressional intent are relevant when courts attempt to reconcile RICO with the NLRA.

B. RICO and the NLRA

The cases that follow address more specifically the extent to which RICO should apply to labor-management disputes in light of congressional intent that the NLRB have exclusive jurisdiction to remedy violations of the NLRA. These cases illustrate the relevant competing considerations in ascertaining whether conduct constituting an unfair labor practice may also serve as a predicate act for RICO.

1. United States v Thordarson

In 1980, the Ninth Circuit was presented with the issue of whether several federal crimes, including RICO, should be applied to violent activity arising out of a labor dispute. In United States v Thordarson, employees of a storage company elected the Teamsters Union as their collective bargaining representative. The company refused to recognize the union and the employees called a strike. During this strike, the company lost several of its trucks because of union violence.

An indictment was filed in federal district court alleging violations of 18 U.S.C. section 844(i), 18 U.S.C. section 844(i) (1982) provides: "Whoever maliciously damages or destroys,
1952 and RICO The district court, relying on Enmons, dismissed all of the charges.

The Ninth Circuit, however, reversed the trial court and held that RICO, and the other federal statutes, applied to violent acts occurring during a labor dispute. In so doing, it "read Enmons as holding only that the use of violence to secure legitimate collective bargaining objectives is beyond the reach of the Hobbs Act." 18 U.S.C. § 1952 (1982) provides in pertinent part:

(a) Whoever travels in interstate or foreign commerce, or uses any facility in interstate or foreign commerce, including the mail, with intent to (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined or imprisoned or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Id. 18 U.S.C. § 1962(c) (1982) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. " 18 U.S.C. § 1962(d) (1982) provides: "It shall be unlawful for any person to conspire to violate any of the [substantive] provisions of this section." See supra notes 85-91.

See United States v. Thordarson, 487 F Supp. 991, 995 (C.D. Cal. 1980). Acts of violence, such as the ones alleged in the instant case, occurring during a lawful labor dispute and resulting in damage to persons or property are punishable under state law. However, there is nothing in the language or history of § 1952 to justify the conclusion that Congress intended [§ 1952] to work such an extraordinary change in Federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States. Id. (quoting Enmons, 410 U.S. at 411).

Thordarson, 646 F.2d at 1337.

Id. at 1327.
The Ninth Circuit held that *Enmons* was based on a reading of the Hobbs Act's "unique legislative history," which contained a statement from its author saying the Act absolutely did not apply to strikes. The court claimed that nothing in the federal criminal statutes in question here indicated that they were not meant to apply to labor violence. The statutes, including RICO, were "written in general terms and make criminal the prescribed conduct without regard to the status or ultimate objectives of the person engaging in it."

In *Enmons*, the Supreme Court expressed the fear that the application of federal criminal statutes to labor disputes would transform relatively minor acts into federal crimes and place the federal government into the business of policing labor-management relations. The *Thordarson* court, however, discounted the import of the Supreme Court's fears, saying "[t]he destruction of vehicles used in interstate commerce by means of explosives and travel in interstate commerce to commit arson are hardly the sorts of minor picket line violence that the *Enmons* Court feared would be transformed into federal crimes under the Hobbs Act."

At least two premises of the *Thordarson* court's analysis are problematic. First, the court looked to the wording of the statutes and their legislative histories and failed to find an intent to exclude these laws from applying to labor disputes. In *Enmons*, however, the Supreme Court focused on Congressional silence concerning the application of the Hobbs Act to labor disputes and concluded that absent clear congressional intent to the contrary, the remedial scheme set out in the NLRA should

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140 Id. at 1330 n.12.
141 *See Enmons*, 410 U.S. at 405-06 (quoting 89 Cong. Rec. 3213 (1943)).
142 *Thordarson*, 646 F.2d at 1327.
143 Id. at 1328.
144 *Enmons*, 410 U.S. at 411.
145 *Thordarson*, 646 F.2d at 1329.
146 This Note does not address the *Thordarson* opinion as it applies to 18 U.S.C. § 844(i), the explosive charge. This Note is concerned with the proper extent to which RICO may convert conduct which previously only constituted an unfair labor practice under the NLRA into a federal crime. The "explosives act" pertains to conduct which is illegal independent of the labor law context. Thus, the argument that the statute should not apply to labor disputes is not advanced here.
147 *Thordarson*, 646 F.2d at 1327
not be altered. In other words, where Congress is silent, the presumption is that a subsequent enactment should not apply to labor disputes. The Supreme Court stated:

[I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

Second, the Thordarson court focused on the seriousness of the crimes committed and found Enmons limited to preventing relatively minor crimes from falling within the Hobbs Act. However, the extortionate acts in Enmons were not minor, and included the destruction of a transformer substation.

The rule of Enmons was based on the potential for applying the Hobbs Act to relatively minor acts of violence occurring during a labor dispute. The Supreme Court explicitly refused to accept the argument that the Hobbs Act should be applied to "serious" acts of violence while carving out an exception for "mischievous" conduct. Thus, the decision of the Ninth Circuit, which seems to adopt such an approach, is at odds with Enmons. The distinctions propounded by the Ninth Circuit in Thordarson are not sufficient to support this deviation from Enmons.

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148 Enmons, 410 U.S. at 411.
149 Id.
150 Thordarson, 646 F.2d at 1329.
151 See Enmons, 410 U.S. at 398.
152 Id. at 410 n.20.
153 Id. at 410 n.20. At this point, it is important to note that the Thordarson court's analysis as it related to the "federal crimes" predicate acts contained in 18 U.S.C. § 1961(1) may have been at odds with Enmons. However, in the RICO context, that problem (the potential of federalizing rather minor crimes occurring in the labor context) can best be handled by not allowing those Enmons-type federal crimes to serve as predicate acts if they do not exist independent of the NLRA. The danger of RICO federalizing relatively minor crimes, however, is small since the state law predicate acts included in the statute are all major crimes (e.g., arson, murder, etc.). See 18 U.S.C. § 1961(1) (1982).
2. *United States v Boffa*

In 1982, the Third Circuit utilized a contrary approach in determining the proper application of the federal mail fraud statute\(^{154}\) and RICO\(^{155}\) to conduct arising out of a labor dispute. In *United States v Boffa*,\(^{156}\) however, it was not the union that was indicted for a RICO violation, but rather the head of a labor leasing organization.\(^{157}\)

The indictment alleged that as a result of a "labor switch," which terminated one employee leasing contract and substituted another group of leased employees,\(^{158}\) the former union employ-

\(^{154}\) 18 U.S.C. § 1341 (1982). The statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more that five years, or both.

*Id.*

\(^{155}\) For relevant text of RICO, see supra notes 85, 88, 90, and 136.

\(^{156}\) 688 F.2d 919 (3d Cir. 1982).

\(^{157}\) See *id.* at 923. While RICO was part of the indictment, the main thrust of the opinion focuses on mail fraud.

\(^{158}\) *Id.* The facts of *Boffa* were as follows:

Between 1971 and 1977, Universal Coordinators, Inc. (UCI), a New Jersey Corporation controlled by Eugene Boffa, Sr. leased truck drivers to Inland's Newark facility. These drivers were represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of American (Teamsters) Local 326, headed by co-defendant Francis Sheeran. Concerned about recurring labor disputes at the Inland plant, appellant Eugene Boffa, Sr. and Sheeran agreed that after the election of officers of Local 326 in November, 1976, Boffa would terminate the leasing contract between UCI and Inland and substitute for UCI a second leasing company controlled by the enterprise. The purpose of the switch was to "cause the employees of UCI to be fired and not rehired by the second leasing company."

The indictment charges appellant Robert Boffa, Sr. with nine mail fraud
ees were deprived both of their statutory collective bargaining rights under section 7 of the NLRA and the contractual rights contained in their collective bargaining agreement. The former union employees alleged this "labor switch" was accomplished by a pattern of racketeering activity. The defendants contended that the labor switches were at most unfair labor practices and not federal crimes.

As to the statutory rights, the court analyzed the legislative history of the NLRA to determine if Congress intended for a deprivation of such rights to be remedied by another federal statute. The court concluded "[a]s a matter of statutory construction, we are unwilling to sanction mail fraud prosecutions for schemes to deprive individuals of a particular intangible right when such a prosecution would contravene the intent of the Congress that created that right." In other words, when Congress created the statutory right to bargain collectively, it intended for violations of that right to be remedied exclusively by the NLRB, and the court found nothing to indicate that Congress intended to create new remedies by enacting the Mail Fraud Statute or RICO.

The remedial, non-punitive nature of the NLRA was persuasive to the court. It noted that NLRA did not provide criminal penalties for unfair labor practices. The overall scheme of the NLRA suggests that Congress did not intend to create violations in connection with a similar labor switch at the Van Wert, Ohio facility of Continental Can Corporation. The alleged purpose of this switch was to enable CWP to obtain higher fees from Continental Can than had been paid to UCI, which paying less to Teamsters Local 908 drivers.

Id. at 923-24.


160 Boffa, 688 F.2d at 923.

161 Id.

162 Id. at 925.

163 Id. at 926.

164 Id., cf. Great Am. Fed. Sav. & Loan Ass'n, 442 U.S. at 366, 372-76 (Deprivation of a right created by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. may not be remedied by a cause of action under 42 U.S.C. § 1985(3), which prohibits conspiracies to deprive persons of federal rights; instead, the right must be remedied as provided in the statute which created it.).

165 Boffa, 688 F.2d at 927

166 Id. at 928.

167 Id.
new criminal sanctions for violations of employees’ section 7 rights. "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."  

The NLRB’s exclusive jurisdiction over unfair labor disputes was also paramount in the court’s decision. The court recognized the importance of the policy behind the NLRA of having an expert administrative body develop national labor policy. In Boffa, the jury would have been required to determine whether the object of the defendants’ scheme constituted an unfair labor practice, which is “precisely the type of statutory question that Congress intended only the [NLRB] to resolve.”

The Boffa court held, however, that the deprivation of employees’ contractual rights, as provided by their collective bargaining agreement, was the type of injury to which the Mail Fraud Statute, a RICO predicate act, could apply. The court reasoned that applying the Mail Fraud Statute to a deprivation of contractual economic rights does not require any interpretation of the NLRA. The contract between the parties created these rights, not the NLRA. Therefore, the court refused “to accept the proposition that the NLRA precludes the enforcement of a federal statute that independently proscribes that conduct as well.”

It is important to notice the Boffa court’s comparison of the NLRA and the Mail Fraud Statute. The Mail Fraud Statute was in existence prior to the enactment of the NLRA, and the

168 Id.
169 Id.
170 Id. at 929.
171 Id., see also Motor Coach Employees v. Lockridge, 403 U.S. 274, 278-80 (1971) (In the context of a “preemption” case the Supreme Court recognized the importance of having an expert administrative body form national labor policy.).
172 Boffa, 688 F.2d at 929.
173 See supra notes 85-87.
174 Boffa, 688 F.2d at 930.
175 Id.
176 Id.
177 Id. at 931.
178 18 U.S.C. § 1341 (1982). This statute was enacted in 1909.
court considered the question to be whether the NLRA was an implied repeal of the Mail Fraud Statute in the context of labor disputes. The court held it was not, stressing the Supreme Court's distaste for implied repeals. RICO, however, was enacted after the NLRA. Thus, the focus of statutory interpretation should be whether, in light of congressional intent for the NLRB to have exclusive jurisdiction over violations of the NLRA, RICO worked an implied repeal of the NLRA—thereby allowing criminal and/or civil sanctions for the same conduct when it can be framed as a RICO violation.

The Boffa court, while generally upholding the validity of a RICO cause of action against the defendants, did not specifically focus its analysis on the interplay between the RICO statute and the relevant provisions of the NLRA. The court concluded that Mail Fraud prosecutions could lie if contractual rights were taken and, since a Mail Fraud violation constitutes a predicate act under RICO, RICO could also apply. Simply because a Mail Fraud prosecution is proper under the Boffa analysis, however, does not necessarily mean that the existence of Mail Fraud-type conduct justifies the application of RICO to the same facts.

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179 See Boffa, 688 F.2d at 932-33.
180 "The Supreme Court has repeatedly emphasized the strong judicial policy against implied repeals." Id. at 932.
182 Since the NLRB never had exclusive jurisdiction over all claims that could also be couched in terms of an unfair labor practice, no "implied repeal" is necessary where RICO applies independently of the NLRA. See, e.g., UAW-CIO v. Russell, 356 U.S. 634, 644 (1958), rehearing denied, 357 U.S. 944 (1958) (employee may sue union for malicious interference with lawful occupation regardless of the fact that NLRA § 8(b) may make the union's conduct an unfair labor practice as well).
183 See Boffa, 688 F.2d at 934-39.
184 See, e.g., id. at 927. "We must determine whether a scheme to deprive employees of rights guaranteed by section 7 of the NLRA is within the ambit of the mail fraud statute. This determination requires an examination of the congressional policies underlying the NLRA." Id.
185 Id. at 926-27; see supra notes 170-77 and accompanying text.
186 See supra note 85.
187 Boffa, 688 F.2d at 930-32.
188 See infra notes 189-93 and accompanying text.
18 U.S.C. section 1961(1) states that "any act which is indictable under [18 U.S.C. section 1341 (mail fraud)] may serve as a predicate act." This section defines racketeering activities by incorporating by reference other types of conduct. This distinction is important because the *Boffa* court implicitly assumed that because certain conduct in the labor law context could constitute a Mail Fraud violation, and RICO incorporated Mail Fraud-type conduct as a "racketeering activity," that it necessarily followed that RICO should apply to a labor dispute where a Mail Fraud prosecution could apply.

As stated above, part of the *Boffa* court's rationale for allowing the Mail Fraud prosecution in a labor dispute was the Supreme Court's distaste for implied repeals. Despite the questionable validity of the *Boffa* court's "implied repeal" analysis, the rule the court created is consistent with *Enmons*. The *Boffa* decision stands for the proposition that if a crime may be proven pursuant to a pre-existing federal statute, without reference to the NLRA, then there is no encroachment on the NLRB's exclusive jurisdiction. Even though the *Boffa* court never mentioned *Enmons*, the rule it created is consistent with that opinion. The determining factor in both *Enmons* and *Boffa* was preventing federal criminal statutes from being applied to conduct that would otherwise only constitute an unfair labor practice.

3. *Butcher's Union v SDC Investment, Inc.*

A subsequent federal district court opinion used the "implied repeal" analysis in the context of a civil RICO suit, specifically

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190 See supra note 86.
191 See *Boffa*, 688 F.2d at 927.
192 See supra notes 178-82 and accompanying text.
193 See, e.g., *Enmons*, 410 U.S. at 400 (Whether the obtaining of property in *Enmons* was "wrongful" could only be determined by making reference to the NLRA. Thus, the Court held the Hobbs Act should not apply where violence is used to obtain potentially legitimate union objectives.).
194 See *Boffa*, 688 F.2d at 931-32.
195 See supra notes 103-13 and accompanying text.
196 See *Enmons*, 410 U.S. at 400; *Boffa*, 688 F.2d at 929 (the *Boffa* court holding that deprivations of employees' NLRA § 7 rights should only constitute unfair labor practices and not mail fraud violations).
recognizing that RICO was enacted after the NLRA. In Butcher's Union v SDC Investment, Inc., a union filed a civil RICO claim against an employer for recognizing another union to avoid dealing with the plaintiff-union as a collective bargaining agent. Illegal payments to the recognized union were allegedly used to accomplish this result.

Such conduct would clearly constitute an unfair labor practice, but the plaintiffs chose to file a civil RICO action. The illegal payments and federal wire and mail fraud statute violations served as the predicate acts constituting a pattern of racketeering activity. Thus, by skillful pleading, the plaintiffs were able to seek treble damages for their alleged injuries.

The defendants in Butcher's Union made the predictable argument that the plaintiff-union was attempting to circumvent the exclusive jurisdiction of the NLRB by bringing what is essentially an unfair labor practice claim in federal district court in the form of a RICO violation. The defendants argued that since the adjudication of the civil RICO claim would require the court to resolve issues within the exclusive jurisdiction of the NLRB, the RICO complaint should be dismissed.

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198 See supra note 90.
199 Butcher's Union, 631 F Supp. at 1002.
200 Id. at 1003. Such conduct clearly violates 29 U.S.C. § 186(a)(1), which is one of the predicate acts enumerated in 18 U.S.C. § 1961(1). See supra note 85. 29 U.S.C. § 186 provides in pertinent part: "(a) It shall be unlawful for any employer or association of employers to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—(1) to any representative of any of his employees who are employed in an industry affecting commerce[.""] Id.
201 Employers are forbidden from contributing financial support to labor organizations by 29 U.S.C. § 158(a)(2). Such conduct also constitutes a violation of 29 U.S.C. § 186.
202 Butcher's Union, 631 F Supp. at 1004.
203 Id., see supra note 90.
204 Butcher's Union, 631 F Supp. at 1005.
Defendants contend that plaintiffs' purported injuries result from three acts: (1) the unlawful recognition of NMV by SDC; (2) the execution of a contract with NMV; and (3) the alleged failure to SDC to hire members of local 498. As such, defendants argue, they amount to unfair labor practices prohibited by the National Labor Relations Act (NLRA) and are subject to the exclusive jurisdiction of the NLRB.

205 Id.
The court recognized that Congress had created, through civil RICO, an additional independent remedy for conduct that traditionally was remediable only by an unfair labor practice claim. The court discussed two other statutory exceptions to the NLRB's exclusive jurisdiction which would allow a plaintiff to bring suit in federal district courts, sections 301 and 303 of the Labor Management Relations Act (LMRA). These sections illustrate that Congress has created statutory remedies in addition to those provided in the NLRA. In the words of the Butcher's Union court, "Congress gets to make the rules—and change them. Congress could, and did, create the NLRB as the exclusive forum for consideration of certain conduct, but can and does create exceptions to that exclusivity." Thus, the issue is whether Congress intended RICO to be another exception to the NLRB's exclusive jurisdiction.

First, the court analyzed the illegal payment claims, concluding that the plain wording of the RICO statute made such

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206 Id. at 1007. "[W]here Congress has provided remedies for proscribed conduct independent of those available in an NLRB proceeding, the preemption doctrine has no application." Id., see also Vaca v. Sipes, 386 U.S. 171, 179-83 (1967) (preemption rule inapplicable where activity regulated was merely peripheral concern of the LMRA).

207 Butcher's Union, 631 F Supp. at 1005-07 Section 301 of the LMRA is codified at 29 U.S.C. § 185 (1982), which provides in pertinent part:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

Section 303 of the LMRA is codified at 29 U.S.C. § 187 (1982), which provides:

(a) It shall be unlawful in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or [sic] any violation of subsection (a) of this section may thereafter in any district court of the United States without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Id.

208 Butcher's Union, 631 F Supp. at 1006; see, e.g., International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237, 241-42 (1952) (Supreme Court allowed civil action to lie for violation of LMRA § 303 even though the conduct fell within the proscription of NLRA § 8(b)(4)).

209 Butcher's Union, 631 F Supp. at 1007.
violations predicate acts, which could constitute a pattern of racketeering activity. This approach is consistent with the "implied repeal" analysis used in Baffa. Here, however, the court analyzed the extent to which RICO is an implied repeal of the NLRA, instead of the extent to which the NLRA is an implied repeal of the federal Mail Fraud Statute.

The court found it "hard to imagine that Congress would have made § 186 a RICO predicate act without the intention of making violations of § 186, which necessarily arise in the labor context, the basis of a RICO action brought in the district court." The court deemed irrelevant the mere fact that such actions might also constitute an unfair labor practice. Thus, Congress expressly created a new remedy for this type of unfair labor practice.

To the extent the pattern of racketeering activity was based on conduct violating the federal mail and wire fraud statutes, however, the RICO claim was not allowed. The court held that RICO's general reference to mail and wire fraud violations as predicate acts was insufficient to overcome the NLRB's exclusive jurisdiction in remedying violations of the NLRA. To the Butcher's Union court, the specific inclusion of conduct violating section 186 as a predicate act was powerful evidence

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210 Id.
211 See supra notes 178-82 and accompanying text.
212 See Butcher's Union, 631 F Supp. at 1007.
213 Id. The court went on to discuss the legislative history of RICO which indicated that Congress intended to prevent organized crime from infiltrating labor unions by making payments to union leaders. Thus, it made a violation of § 186 a RICO predicate act. Id. at 1008.
214 Id. at 1009.
215 Id.

217 Id. at § 1343. The statute provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

218 Id.
219 Butcher's Union, 631 F Supp. at 1009.
220 Id.
of congressional intent to have all other labor law violations remain outside the ambit of RICO. The focus is on whether the description of the type of conduct included in the list of RICO predicate acts is sufficiently specific to reference labor-related conduct. If not, RICO, due to its generality, cannot be read as an implied repeal of the otherwise exclusive jurisdiction of the NLRB to remedy unfair labor practices.

If this analysis is accurate, then RICO cannot apply to cases in which the alleged pattern of racketeering activity also constitutes an unfair labor practice. This rule exceeds the Enmons/Boffa framework and goes beyond what is required to protect the NLRB's exclusive jurisdiction over unfair labor practices.

Perhaps in recognition of the extremity of this rule, the Butcher's Union court posited an alternative rationale for its decision, holding that the wire and mail fraud violations could not serve as predicate acts for a RICO claim if such violations would not exist but for the NLRA. In other words, the court applied the same rule as the Boffa court, saying:

In essence, the defendants' use of the mails or wire is an indictable offense only where its purpose is the execution of a fraud. Whether the conduct constitutes a fraud is defined elsewhere by the law. Under the instant complaint, this configuration is crucial since, under plaintiffs' allegations, the only reason defendants' conduct can be alleged to be unlawful is that it is denounced by labor law.

To accept the Butcher's Union court's conclusion that a RICO claim may not be brought if the alleged pattern of racketeering activity also constitutes an unfair labor practice, it is

220 Id.
221 See id.
222 Since LMRA § 302 (29 U.S.C. § 186) is the only labor law violation specifically referenced in RICO's predicate acts, no other conduct constituting an unfair labor practice could be the basis of a RICO violation. See supra note 85.
223 See supra notes 103-13, 139-96 and accompanying text.
224 Butcher's Union, 631 F Supp. 1010-11. The court described this rationale as "more persuasive." Id.
225 See supra notes 172-77 and accompanying text.
226 Butcher's Union, 631 F Supp. at 1011.
227 See supra notes 204-22 and accompanying text.
necessary to insert a missing premise into the argument. The missing premise is that the NLRB's exclusive jurisdiction over unfair labor practice claims preempts any other cause of action based on the same facts. However, this has never been the case. For example, an employer who assaults his union employee to discourage him from exercising his NLRA rights would be committing an unfair labor practice. Such conduct would also give rise to state criminal and tort claims. Simply because conduct may constitute an unfair labor practice does not immunize the perpetrator from liability under any other law. The court's alternative rationale is more consistent with the previously discussed cases and provides a more reasonable means of reconciling any tensions between the NLRA and RICO.

4. Local 355, Hotel, Motel, Restaurant & Hi-Rise Employees v. Pier 66 Co.

While it is clear that the NLRB's exclusive jurisdiction does not immunize a defendant from all liability resulting from the violation of other laws, one federal district court has taken the position that any fact pattern giving rise to an unfair labor practice may not be the basis of a RICO claim, regardless of whether proving the RICO claim would require a NLRA determination. In Local 355, Hotel, Motel, Restaurant & Hi-Rise Employees v. Pier 66 Co., the court refused to allow a civil RICO suit because to do so would provide a plaintiff with a means of circumventing the exclusive jurisdiction of the NLRB. In Pier 66, the union alleged that the company engaged in a pattern of racketeering activity by offering its employees monetary inducements to file a decertification petition with the

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228 See supra notes 218-21 and accompanying text.
230 See supra notes 66-69 and accompanying text.
231 Id. See UAW-CIO, 356 U.S. at 640-42 (conduct constituting unfair labor practice also gave rise to state tort liability for malicious interference with lawful occupation).
232 See supra notes 66-69 and accompanying text.
234 Id. at 764.
Such conduct, if proven, would violate section 302 of the LMRA, as well as the RICO statute.

The court found that the union was attempting to bring its claims under the guise of various federal criminal statutes to circumvent the NLRB's exclusive jurisdiction over unfair labor practices. The Pier 66 court ruled that even though the RICO statute explicitly provides that violations of LMRA section 302 constitute RICO predicate acts, such payments would also violate employee rights under the NLRA and therefore come under the exclusive jurisdiction of the NLRB. As the court put it: "[c]ontinued litigation of this matter would be tantamount to providing the Union with a means of circumventing unfavorable decisions by the NLRB regarding its unfair labor practice claims. This court, therefore, will defer to the expertise of the NLRB."

While the court's recognition of the need to limit the application of civil RICO to labor disputes is consistent with the Enmons/Boffa policies of preserving the integrity of the NLRB, its rule goes beyond what those cases require. First, the court treated the dispute as involving a preemption issue as opposed to a conflict of federal statutes. This is erroneous because preemption only determines the extent to which a federal statu-

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235 Id. at 762. Such a petition would require the NLRB to conduct an election to determine if bargaining unit employees still desire to have the union as their collective bargaining agent. See R. Gorman, supra note 2, at § 6.
238 Pier 66, 599 F Supp. at 763.
239 Id., see supra note 85.
240 29 U.S.C. § 158(a)(1) (1982). This is often called a "residuary violation" of the NLRA, since any abridgement of § 7 employee rights by an employer constitutes a violation of § 8(a)(1).
241 Pier 66, 599 F Supp. at 763.
242 Id. at 764.
243 See supra notes 103-13, 139-96 and accompanying text.
244 See Pier 66, 599 F Supp. at 768.
245 The NLRB is vested with primary jurisdiction to determine what is or is not an unfair labor practice. Federal courts do not have jurisdiction over activity which is arguably subject to § 7 or § 8 of the [NLRA], and they 'must deter [sic] to the exclusive competence of the National Labor Relations Board.

Id. (quoting Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83 (1982)).
tory scheme precludes state laws covering the same subject matter.\textsuperscript{245} Even if Congress in 1935 meant for the NLRA to preempt the field of labor law totally, a subsequent federal statute may amend that exclusivity \textsuperscript{246}

**CONCLUSION**

The issue, simply stated, is to what extent RICO alters the remedial scheme of the NLRA in labor dispute applications. Resolving the issue requires focusing on the type of conduct claimed to constitute the requisite "pattern of racketeering activity" and making two determinations. First, whether there is any conflict with the NLRA and second, if so, whether RICO's description of the conduct is sufficiently specific to evidence a congressional intent to provide a new remedy \textsuperscript{247}

First, contrary to the *Pier 66* decision, the mere fact that the conduct may constitute both a predicate act proscribed by RICO and an unfair labor practice under the NLRA is not sufficient to show that RICO should not apply \textsuperscript{248} RICO should be limited by the exclusive jurisdiction of the NLRA only when the court would be forced to determine whether some portion of the defendant's conduct violated the NLRA as a condition precedent to the existence of a RICO predicate act.\textsuperscript{249} If that determination is unnecessary, then RICO clearly applies.\textsuperscript{250} For example, a series of violent state law crimes constituting a pattern of racketeering activity might be a RICO violation.\textsuperscript{251} However, depending on the objective to be achieved by this conduct, it might also constitute an unfair labor practice.\textsuperscript{252} If the predicate acts

\textsuperscript{245} Congressional authority to preempt a given area of the law is derived from the Supremacy Clause of the Constitution. See U.S. Const. art. VI, cl. 2.

\textsuperscript{246} See *Butcher's Union*, 631 F Supp. at 1006 ("Congress gets to make the rules—and change them.").

\textsuperscript{247} See supra notes 176-82 and accompanying text.

\textsuperscript{248} Id.

\textsuperscript{249} See supra notes 193-96 and accompanying text.

\textsuperscript{250} See United States v. Boffa, 688 F.2d 919, 930-32 (3d Cir. 1982).


\textsuperscript{252} For example, a series of violent acts by union members in order to "persuade" non-union workers not to work during a prolonged strike could constitute a violation of 29 U.S.C. § 158(b)(1) (violating employees' right not to participate in union activity).
exist independent of any judicial resolution of unfair labor practices, the NLRB's exclusive jurisdiction is not violated.253

When the existence of a RICO predicate act depends on the resolution of an NLRA violation, then the question becomes whether Congress, in enacting RICO, meant for some types of unfair labor practices to also constitute predicate acts.254 Since this would be an exception to the NLRB's exclusive jurisdiction, the RICO statute must describe the conduct with sufficient specificity to evidence a congressional intent to modify the remedial scheme of the NLRA.255 This is exactly what Congress did when it specifically made a violation of 29 U.S.C. section 186 a RICO predicate act.256 While violating this statute is clearly a labor law violation and an unfair labor practice,257 it is also a type of conduct Congress felt the need to bring within the proscription of the RICO statute.258 Since Congress specifically included this type of labor violation within the list of RICO predicate acts, the inclusion of other more generic federal crimes as RICO predicate acts was probably not intended to bring other unfair labor practices outside the exclusive jurisdiction of the NLRB.259

Thus, where a pattern of racketeering activity may be shown without reference to the NLRA, a RICO prosecution does not violate the NLRB's exclusive jurisdiction. Notwithstanding the Pier 66 decision, this is true even if the predicate acts also constitute unfair labor practices. Should a court be required to determine the existence of an unfair labor practice to resolve the plaintiff's RICO claim, then the RICO statute must clearly describe that type of conduct as a predicate act in order to evidence congressional intent to alter the traditional remedial scheme of the NLRA.

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253 See supra notes 163-72 and accompanying text.
255 Id.
256 Id.
259 See Butcher's Union, 631 F Supp. 1001, 1009-10.