CONSTRUCTION UNION USE OF ENVIRONMENTAL REGULATION TO WIN JOBS: CASES, IMPACT, AND LEGAL CHALLENGES

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This Article examines construction union use of the permitting process required by environmental legislation as a pressure tactic to gain jobs. It explains why such action can be effective in the construction industry. Cases which demonstrate how such union intervention works in practice are described in detail, as are countermeasures used by or available to contractors.

I. CONSTRUCTION UNION DECLINE AND POLICIES TO REGAIN JOBS

Union contractors have lost considerable market share since the 1960s. These losses have been accompanied by membership losses that have halved construction union ranks.

A. *Construction Union Membership Decline and Loss of Market*

In 1973, 40% of the construction labor force were members of the AFL-CIO building and construction unions; by 1994, only 18.8% were members.[1] Meanwhile, the construction labor force had increased by almost one million members.[2] In the first nationwide study of the market penetration of "open shop"[3] construction, the authors estimated that in 1975, "it appear[ed] likely that the open shop builders [were] in the majority and probably control[led] 50 to 60 percent of the total work."[4] A second nationwide study made nine years later concluded:

> That the dollar volume of construction produced by union craftsmen is not likely to exceed 30 percent of the total . . . . During the years since 1970, open shop construction has increased in the sectors and regions in which it has historically dominated. At the same time, sectors and regions which traditionally have been union strongholds have been significantly penetrated by the open shop.[5]

No study of this nature has been published since 1984, but based on regular monitoring of the field, the open shop share of the construction dollar probably has stabilized at 75% to 80%.[6]

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1. Union membership data are published annually in the U.S. Bureau of Labor Statistics monthly journal, *Employment and Earnings*, usually in the January, but sometimes in the February issue, and then reprinted in the Daily Lab. Rep. (BNA).

2. Data on the construction labor force are published monthly in *Employment and Earnings*. The construction labor force grew from four to five million members during the 1980s. It declined by almost 500,000 during the recession years of the early 1990s. It began a slow upward movement in 1992, but the gains since then have been largely in homebuilding, which nationally is more than 90% open shop. The urban, high rise commercial building sector has been in a serious slump since 1989 because of high vacancy rates throughout the country resulting from overbuilding in the 1980s. Because this sector is a cornerstone of construction union strength, this factor has contributed to the industry's union decline in recent years.

3. An open shop is allowed to hire nonunion employees; a closed shop only is allowed to hire union employees. As a result, open shops are primarily nonunion.

4. HERBERT R. NORTHRUP & HOWARD G. FOSTER, OPEN SHOP CONSTRUCTION 351 (1975).

5. HERBERT R. NORTHRUP, OPEN SHOP CONSTRUCTION REVISITED 27-28 (1984) [hereinafter OSCR].

6. Dr. Northrup's estimates are based on regular monitoring of association, contractor, and union contacts and their publications. For case studies in one State in which union construction virtually collapsed, and in another in which union control has largely been maintained, see Herbert R. Northrup, *Arizona Construction Labor: A Case Study of Union Decline*, 11 J. LAB. RES. 161 (1990); Herbert R. Northrup, *The Status and Future of Unionized Construction in New Jersey*, 4 N.J. BUILDING CONTRACTOR 9 (1990).

B. *Innovative Attempts to Regain Union Market Share*

In response to this decline, construction unions and union contractors have developed a host of economic and political initiatives to bolster or protect their memberships and businesses. Many contractors either have broken with unions and now operate open shop, or have developed or purchased an open shop company and now operate "doublebreasted," that is, they have two separate firms, one union, one open shop. This permits them to bid on jobs regardless of the union orientation in a given sector or area.[7]

Unions and contractors also have negotiated agreements removing or modifying numerous restraints on productivity and flexibility of operations, although many such restraints remain in agreements in some localities.[8] Union wage and benefit increases have slowed dramatically since 1980. In 1994, such increases averaged 2.7% for the first year and 3.0% for the second year of multiyear agreements. In contrast, these increases often exceeded 10% annually between the years 1965 and 1980.[9]

The construction unions, however, have determined that economic actions alone are insufficient to regain their market share. They have begun, therefore, to take both political and direct actions. On the political front, construction unions are pushing several laws that would enhance their power[10] and are pressuring

7. For a discussion of doublebreasted operations, see Herbert R. Northrup, *Construction Doublebreasted Operations and Pre-Hire Agreements: Assessing the Issues*, 10 J. LAB. RES. 215 (1989) [hereinafter *Doublebreasted Operations*]; Northrup, *Doublebreasted Operations and the Decline of Construction Unionism*, 16 J. LAB. RES. 379 (1995).

8. The Construction Labor Research Council ("CLRC"), the research institute for union contractors, has placed "terms and conditions" costs in union construction for 1993 at $2.18 per hour. It states that although the percentage cost of contract terms and conditions has declined since the early 1980s, absolute costs have risen as the industry wage and fringe rate has increased. *See Cost of Terms and Conditions in Collective Bargaining Agreements*, CLRC, Mar. 1994, at 2; *see also* CLRC, COST REDUCING MODIFICATIONS TO CONSTRUCTION COLLECTIVE BARGAINING AGREEMENTS (1992) (study prepared by the CLRC for the Associated General Contractors Basic Trades Committee). A preliminary result of another CLRC study has found a marked improvement in local union restrictive practices and a reduction in jurisdictional disputes. *See Study Reports Improvement in Local Labor Practices*, 40 Construction Lab. Rep. (BNA) 766 (Oct. 12, 1994).

9. *See 1995 Construction Labor Trends and Outlook*, CLRC, Feb. 1995, at 3; *Wage and Benefit Settlements in Construction 1994*, CLRC, Dec. 1994, at 1. Wage and benefit settlements during the 1960s and 1970s can be found in annual publications of the U.S. Bureau of Labor Statistics entitled *Wage and Benefits: Building Trades*. This series was discontinued after 1981.

10. A prime example of legislation pushed by the construction unions is a proposed amendment to the Employee Retirement Income Security Act of 1974 ("ERISA") that would provide that ERISA does not preempt any state law requiring payment of prevailing wages and benefits on public projects, any state law regulating apprenticeship and train-

local governments to require all-union agreements on major projects, which would preclude the use of open shop contractors.[11]

By direct action, the construction unions are engaged in a number of innovative programs. The most important are "salting"—having union members or organizers take jobs with open shop contractors to organize the employees and to disrupt open shop contractor operations;[12] "job targeting"—subsidizing union contractors to win bids and jobs by directly or indirectly paying part of wages and benefits from various pooled funds;[13] and regulatory action—the subject of this Article.

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ing, or any state law providing for collections of multiemployer plan contributions from open shop contractors. Its purpose is to reverse court decisions that have prevented States from denying open shop contractors accreditation of training programs, enacting restrictive prevailing wage laws, and requiring contributions of non-signatory companies to union welfare and pension plans. *See* Electrical Joint Apprenticeship Comm. v. McDonald, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992); Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719 (9th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990); Operating Eng'rs & Participating Employers Pre-Apprentice, Apprentice, & Journeyman Affirmative Action Training Fund v. Weiss Bros. Constr. Co., 221 Cal. App. 3d 867 (1990), *cert. denied*, 499 U.S. 931 (1991). The unions have achieved a victory in a recent appeals court decision which ruled that ERISA does not preempt state "Little Davis-Bacon" (prevailing wage) acts. *See* Keystone Chapter, Associated Builders & Contractors, Inc. v. Foley, 37 F.3d 945 (3rd Cir. 1994), *cert. denied sub nom.* Keystone Chapter, Associated Builders v. Pennsylvania Secretary of Labor and Indus., 115 S. Ct. 1393 (1995). However, in General Elec. v. New York State Dep't of Labor, 891 F.2d 25 (2nd Cir. 1989), *cert. denied*, 496 U.S. 912 (1990), and in Associated Builders & Contractors v. Perry, 869 F. Supp. 1239 (E.D. Mich. 1994), state "Little Davis-Bacon" laws have been found preempted by ERISA because of regulation of contractor employee benefits.

Other legislation supported by the construction unions would expand the coverage of the Davis-Bacon prevailing wage law, outlaw doublebreasted operations, *see generally Doublebreasted Operations*, *supra* note 7, and eliminate the use of helpers on federally-funded projects, *see generally*, Herbert R. Northrup, *The "Helper" Controversy in the Construction Industry*, 13 J. LAB. RES. 422 (1992). Construction unions also have joined with other unions in supporting a striker replacement ban. The likelihood of any of these initiatives becoming law is very slim so long as the Republican Party controls Congress.

11. The United States Supreme Court ruled in the *Boston Harbor* case that such agreements are lawful. *See* Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 113 S. Ct. 1190 (1993). Such agreements, however, may run afoul of state competitive bidding laws. *See, e.g.*, George Harms Constr. Co. v. New Jersey Turnpike Auth., 644 A.2d 76 (N.J. 1994). *But see* General Bldg. Contractors of N.Y. State Inc. v. Dormitory Auth., 210 A.D.2d 788 (N.Y. App. Div. 1994); New York State Chapter Inc. v. New York State Thruway Auth., 207 A.D.2d 26 (N.Y. App. Div. 1994). The New York Court of Appeals, the highest New York court, has agreed to review these last two decisions. *See New York Appellate Court Agrees to Review Project Agreement Cases*, Daily Lab. Rep. (BNA) No. 45, at A-3 (July 11, 1995).

12. For a description of "salting" tactics, the National Labor Relations Board ("NLRB") and court decisions relating thereto, see Herbert R. Northrup, *"Salting" the Contractors' Labor Force: Construction Unions Organizing with NLRB Assistance*, 14 J. LAB. RES. 470 (1993). For a brief description of other construction union tactics, see *id.* at 471-72.

13. The Court of Appeals, District of Columbia Circuit, found such activity illegal with regard to jobs that involve federal funding and that are subject to Davis-Bacon laws. *See*

II. Development of the Environmental Action Program

By the early 1980s, California, historically a strong construction union state, was trending to the open shop, particularly in its southern and eastern portions, and in areas north of the San Francisco Bay. San Francisco remained heavily unionized except for homebuilding and general remodeling.[14] By the mid-1980s, the local unions of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry in the United States and Canada ("Plumbers and Pipefitters" or "UA") in the counties around San Francisco Bay had determined to take action to strengthen their position.

A. *The Computerized Data Base Program*

The first step was the creation of a computer data base. The purpose was twofold: to track all general contractors and subcontractors, and to track all permits issued. Dubbed "the pipeline," the database includes information about contractors and about buyers of construction services ("owners" or "users"), such as their current and past projects, financing, and any political involvement. It also specifies whether the contractors are union, open shop, or doublebreasted.

Additional information may include whether contractors previously have given unions "difficulties" at any location, whether contractors have a sound safety record, and whether Occupational Safety and Health Administration ("OSHA") charges exist against them, and whether contractors' workmanship has been in line with local ordinances pertaining to construction. All such information can be used as ammunition by the unions at permit hearings or in publicity programs.

Simultaneously, the unions feed into the data base all permit applications and permits granted, except minor ones granted to homeowners doing their own work. Unions considered it impor-

Building & Construction Trades Dep't v. Reich, 40 F.3d 1275 (D.C. Cir. 1994). A charge that job targeting in the private sector violates antitrust legislation was dismissed on summary judgment and is on appeal to the Ninth Circuit Court of Appeals. *See* Phoenix Elec. Co. v. National Elec. Contractors Ass'n, 861 F. Supp. 1498 (D. Or. 1994). Previously, a magistrate for the court recommended dismissing this suit. *See* 40 Construction Lab. Rep. (BNA) 19 (Mar. 3, 1994). These cases and other involving state legislative compatibility with job targeting are discussed in detail in Herbert R. Northrup & Augustus T. White, *Subsidizing Contractors to Gain Employment: Construction Union "Job Targeting"*, 17 Berkeley J. Employment & Lab. L. (forthcoming Jan. 1996).

14. For a description of the expansion of open shop construction in California, see OSCR, *supra* note 5, at 83-85, 163-70, 229-31, 264-66, 307.

tant to learn about permits as soon as applications are filed, so that action can be taken before the permit is issued. For smaller projects, the time between application and issuance is about two weeks; for bigger projects, it may be as long as three or four months.

Information is updated regularly, and often weekly, through a program called "BIDS," Bidder Information and Directory Service. Thus, each week the unions can decide which permit applications "need their attention." Such information also is sent to union plumbing and pipefitting subcontractors and to local unions.[15]

B. *Intervening in the Permitting Process*

With this knowledge, the construction unions can take various actions. When union contractors are involved, they may encourage members and union officials to support the permit applications as environmentally sound and a boon to employment at good wages. They also may pressure environmental organizations that generally cooperate either to support the project or at least to refrain from opposing it.

When open shop contractors are involved, construction unions take the opposite stance, but usually first attempt to persuade the user to give the job to a union firm by pointing out the advantages of having union support in the permitting process. Unions also may attempt to plant "salters" and to organize the open shop contractor's work force if the job is started. If they fail to secure the jobs for union members, however, the construction unions will use legal maneuvers to delay or stop the project or to add to its costs.

For example, unions intervening in the permitting process often begin by claiming that the user's application does not protect sufficiently the air or water quality, that drainage or waste disposal plans are insufficient, or that the construction plan violates other environmental regulations. The union posture may be supported by environmental groups and by "consumer groups"

15. This description is based upon numerous interviews, studies of cases, and other information collected by the authors, including video tapes by union officials describing their organization and activities. *See Building Trades Plan Toyota-Type Fights*, ENGINEERING NEWS REC., Feb. 7, 1987, at 42; *San Francisco Crafts' Computer System to Monitor Area Construction Activity*, Daily Lab. Rep. (BNA) No. 243, at A1 (Dec. 18, 1986). *See generally* Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 CAL. L. REV. 757, 759 (1992).

that spring up and likely are controlled or funded by unions. Sometimes there are environmental deficiencies in the applications that should be corrected. Often, however, the union action seems more designed to inflict costs on the users than to protect the environment.

Construction delays can be extremely costly. When a project is delayed, more taxes, interest, general overhead, and payroll mount with no attendant return on investment. Years ago when construction unions were more powerful, one author explained that strikers could just "watch the clock tick [the contractor] into terms."[16] The permitting process allows union intervention to recreate this past union power by using delays to stymie construction rather than strikes to interrupt it.

Additionally, union intervenors may claim that the open shop contractor pays "starvation wages." They may demand that the contractor be required to pay "prevailing" (that is, union) rates. Unions usually also claim that the open shop contractor is "importing" labor instead of using local personnel. They demand that the contract require a certain percentage of local personnel. Such demands ignore the rates actually paid by open shop contractors and the fact that the unions pride themselves on being able to import "travelers" from other areas when needed, as in the case of the retrofit in the San Francisco Bay oil refineries.[17]

16. HERBERT HARRIS, AMERICAN LABOR 151 (1938).

17. *See infra* Part III.C. The charge by construction unions that open shop contractors import large numbers of out-of-state workers is a standard one. It generally is true only when violence and intimidation prevent local workers from taking a job with an open shop contractor. Actually, it is the construction unions that typically do heavy importing on large jobs. Although both union and open shop contractors bring a coterie of supervisors and some key craftsmen to jobs, open shop contractors use subjourneymen (helpers) to perform semiskilled work. They can train local personnel to do this work by teaching one or a few tasks, rather than attempting to develop well-rounded craftsmen. On the other hand, union contractors generally are not permitted to utilize subjourneymen in heavily unionized areas like San Francisco. Instead, they must train by apprenticeship, which requires four or five years to complete. Union contractors, therefore, must use craftsmen to do much of the semi-skilled work. Consequently, when the local supply of craftsmen is depleted, as it often is as a result of restrictive union membership practices, union contractors must depend on "travelers" supplied by the union hiring hall. The net result is little training for local personnel beyond regular apprenticeship and substantial importation of skilled personnel who leave as the job is being completed. In New York City, for example, when the commercial office building boom began to recede in 1990, the travelers were the first to go. One report recorded, "Given all the out-of-state license plates . . . he has seen at city building sites, Professor Drennan wonders about the impact of the decline in new construction on local workers . . . ." Richard Levine, *As Towers Top Off, Construction Boom Fades in New York*, N.Y. TIMES, July 2, 1990, at B1, B3.

C. *District 51, Plumbers and Pipefitters*

Although other California unions have intervened on environmental grounds in permit applications, none has approached the extent or success of District 51, Northern California—Northern Nevada Pipe Trades Council.[18] Twenty plumbers and pipefitters local unions were affiliated with the Council, which, after many years as an unofficial body, was chartered in 1988 by the national union as District 51.[19] Thomas J. Hunter served as the executive director throughout its existence.[20] District 51-affiliated local unions claimed approximately 14,000 members.

In 1985, the Council and its constituent unions formed the "Job & Community Protection Program." Thomas Adams of San Mateo, an experienced environmental attorney, and his firm, Adams & Broadwell,[21] has provided advice and legal representation for the Program. Thomas Reid Associates, Palo Alto, which claims to be a specialist in environmental impact analysis, ecological studies, and resource management, has provided environmental analysis.[22]

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18. Prior to its dissolution, District 51 was a subsidiary body of the UA.

19. These local unions are Nos. 62, Monterey; 159, Richmond; 228, Marysville; 246, Fresno; 342, Oakland; 343, Vallejo; 350, Reno; 365, Santa Cruz; 393, San Jose; 437, Modesto; 444, Oakland; 447, Sacramento; 460, Bakersville; 467, San Mateo; 471, Eureka; 483, San Francisco; 492, Stockton; 503, Salinas; and 662, Redding. District 51 is headquartered in Burlingame. A twentieth local union, 669, joined the Council at a later date.

20. Hunter is also vice-president of the UA for District 5, which includes the States of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Nevada, Oklahoma, Oregon, Utah, and Washington.

21. Formerly Adams, Broadwell & Russell.

22. A brief history of the program from the union point of view is found in Chris Bedford, *California Pipe Trades Protecting the Environment*, 7 LAB. REL. REV. 91 (1988), and in the video, *A Presentation of the Northern California Northern Nevada Pipe Trades, District Council #51* (1992) (on file with author) [hereinafter *Union Video*], describing the union's work and successes. Bedford acted as writer, producer, and camera man. Bedford also has worked with the West Virginia group described *infra* Part III.E. For a picture of him lecturing, see *25 Construction Trades, Environmentalists Meet*, ACT REP., Nov. 1992, at 2. For another early description of the District 51 program, see *Northern Calif. Pipe Trades to Expand Successful Market Recovery Program*, 36 Construction Lab. Rep. (BNA) 500 (July 15, 1990).

All cases studied found Adams or his firm representing District 51, and the Reid firm submitting its version of the environmental situation and alleged requirements. Both Adams and Reid appear prominently in the video, with Reid as the initial speaker in the section described as "Blueprint for the Future Pipeline Inventory Program." Adams explains how "we designed a way for the unions to participate in the permit process that was more constructive and would yield fair results for labor's political efforts," and in another of his appearances, noted that "a lot of times we convince the developer that . . . he should enter into an agreement with the unions to make the project a union project." *Union Video, supra.* The video narrator stated, "The first major test of the job and community protection program, often called the 'Tom Adams Program' for short, occurred near Redding, California, in the Fall of 1986." *Id.* Reference was made to the *Signal* case, discussed at length, *infra* Part III.A. Marvin Boede, president of the UA, also appears in the

A checkoff from the union members' wages provided the necessary funds for the project. At first, this was set at fifteen cents per hour, but more recently it may have been increased.[23] Not all contractors agreed to provide the checkoff. Nevertheless, the funding was ample to provide for the program, including legal and consultant fees, publicity, advice, political activity, and consultation with other unions,[24] both in California and in several other States as well.[25]

Another aspect of the program is close cooperation with state plumbing code inspectors. Some such personnel are ex-union members.[26] The program also has developed relationships with state environmental agency personnel, state and municipal legislators, and environmental organizations. Organized labor is a potent political force in California, and District 51 officials played a major role in labor political action. As one union business agent stated on the District 51 video:

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video, as do the business agents of the various local unions affiliated with District 51. *See Union Video, supra.*

23. Information from interviews with various companies, California (Jan. 1994). Some stated that District 51 affiliates were requesting checkoffs of as high as 50& per-hour. These companies declined to participate in any checkoff of any amount. The possible legal implications of this checkoff and fund are discussed *infra* Part III.

24. For its first fiscal period, Sept. 1, 1986 to June 30, 1987, District 51 reported income of $1,063,077 and disbursements of $1,034,113. Nearly all the income came from the per capita tax collected by the checkoff. Disbursements included $422,296 for professional fees, predominantly legal fees; $405,341 in office and administrative expenses, presumably covering the computer system; and $95,067 for educational and publicity, which could include educating politicians and administrative agency personnel. *See* District 51, Labor Organization Annual Report, Form LM-2 (Sept. 1, 1986 to June 30, 1987) (available from the U.S. Department of Labor).

For the period July 1, 1992 to June 30, 1993, the latest information available, District 51 had income of $2,700,517 and expenses of $2,773,591, thus operating a deficit made up by previous surpluses. It spent $958,918 on professional fees, $872,043 on employees and benefits, $225,019 on office and administrative expenses, only $16,690 on educational and publicity activities, $196,737 on withholding taxes, and $246,625 "for other purposes." District 51, Labor Organizational Annual Report, Form LM-2 (1992-93).

It apparently was these high expenditures on professional fees and administrative, office, and employee salaries and benefits, plus the loss in 1992-93, that caused the dissatisfaction of some of the local unions affiliated to District 51.

In addition to District 51's own assets and income, those of the affiliated unions are available. These local unions had income approximating $15 million in fiscal year 1992-93, according to their Labor Organization Annual Reports. They should, therefore, have ample funding to continue their environmental permitting program if they so desire.

25. Local Union 290 in Oregon has joined the program. *See Plumbers Oppose Oregon Port Project on Environmental Grounds*, 38 Construction Lab. Rep. (BNA) 286 (May 13, 1992). For activities in other States, see the discussions concerning The Industrial Company and West Virginia, *infra* Part III.E-D.

26. One such inspector actually appears on the District 51 video explaining the allegedly poor job done by an open shop builder. The video also reports that District 51 has employed an ex-state inspector whose job is to develop information on alleged violations by open shop contractors. *See Union Video, supra* note 22.

> The Council [District 51] really helps on the political end of this thing. The things that we can't get done sometimes, especially on the state level, the national level even[, the Council gets done].[27]

District 51 acted as the cutting edge for all construction unions in Northern California. It demanded "wall-to-wall" union jobs as part of its program. If unsuccessful, however, it would accept just the work under its jurisdiction, with work in other crafts being done open shop.

The District 51 program was very successful. Its environmental permitting activities resulted in numerous jobs being given to union firms. District 51 claimed to have won a majority of the cogeneration projects built in California during the 1980s, some commercial jobs, a share of tract housing in Northern California, and major retrofitting of petroleum refineries for "clean" gasoline. Discussions with open shop builders, various companies, and attorneys active in construction in California did not contradict these claims.

District 51's career as a formal organization ended in 1994. Because of dissension, allegedly over financial matters, UA President Marvin J. Boede put District 51 into receivership in March. It then was dissolved formally in July of that year.[28] The local unions, however, probably plan to continue using environmental permitting pressures and to cooperate informally as they did prior to the establishment of District 51. Whether Adams and Reid will continue to provide legal and environmental advice is doubtful.

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27. *Union Video*, *supra* note 22.

28. *See* Letter from Marvin J. Boede, General President, UA, to Michael Beavers, President, and Thomas J. Hunter, Executive Director, Northern California & Northern Nevada Pipe Trades District Council No. 51 (June 24, 1994). Boede stated "that there continues to be serious internal dissension within District Council 51" and that "it is appropriate for me to dissolve District Council 51 as a chartered body under the Constitution." *Id.* As a result of alleged disagreements over financial matters, *see supra* note 24, a bid by Hunter for a new term as executive director at first failed by an even split among the twenty local unions. One local failed to vote in a second election, and Hunter won ten to nine, but several locals refused to continue paying dues. This led to the trusteeship and then to the dissolution order.

In addition to these disputes, the locals well may have felt that the expense of District 51 no longer was justified due to the very success of its program. District 51 had succeeded in winning the retrofitting work for "clean" gasoline in all but one of the major California refineries, *see infra* Part III.C. This work amounted to two years of full employment for the pipe trades, particularly in the San Francisco Bay area.

D. *California's Environmental Legislation*

Part of the success of District 51's program must be attributed to the quagmire of California's environmental legislation. The State has piled law upon law, created an enormous bureaucracy with county and district agencies, and duplicated the work of the federal Environmental Protection Agency ("EPA") in many arenas. Moreover, some of the rules and regulations of these agencies are hundreds of pages long and written in language virtually indecipherable to the lay person.[29]

Even without union intervention, obtaining building permits in California can be a long, drawn-out, and expensive process requiring numerous permits from several agencies. As described in the *Signal* case,[30] applicants may find that approval from one agency does not preclude another agency from charging a violation. The rules and regulations of the permitting process, which invite public comments and place few restrictions on the reopening of cases, are tailor-made for environmental groups to create costly delays, or even to deny the permit.

III. Case Studies of Union Use of Permitting Process

Union attempts to win jobs by intervening in the permitting process are explained best by examining cases. The following were selected as examples of this union tactic.

A. *Signal Energy Systems, Inc.: Shopping for a Friendly Forum*

On February 10, 1986, Signal Energy Systems, Inc.'s ("Signal") subsidiary,[31] the Signal Cottonwood Energy Company, applied for a permit to construct a 49.9-megawatt, small power, wood-fired cogeneration plant, also referred to as the "Cottonwood Biomass Plant," in Shasta County, Northern California. The

29. West Publishing Company's tome, California Environmental Laws (1991), is a 9.75 inch high, 2.25 inch thick volume that does not even include the air quality laws, instead advertising another book covering that subject as "the perfect companion." For the updated California Environmental Quality Act, see Consulting Eng'rs & Land Surveyors of California, 1994 California Environmental Quality Act, CEQA Guidelines, 1994 Environmental Protection Permit Reform Act (1993).

30. *See infra* Part III.A.

31. Signal Energy Systems was a subsidiary of the Signal Companies that merged with Allied Chemical Company to form Allied Signal, Inc. Soon after the merger, Allied spun off a number of the merged subsidiaries and divisions, including Signal Energy, to the Henley Group. Signal Energy later became a subsidiary of Wheelabrator, which likewise formerly had been a part of Henley, and at that point changed its name to Wheelabrator Energy Systems. The reference to Allied Signal as the final settler of the dispute with the California-Nevada Pipe Trades Council, *see* Bedford, *supra* note 22, at 92, is erroneous.

county's Air Pollution Control District ("APCD") issued a Notice for Public Comments one month later. Reid and Adams contacted the APCD one month after that. They requested information and claimed that the application was incomplete for numerous reasons, including the absence of detailed information on fine particulates ("PM10") emissions. Reid wrote to the APCD:

> I suggest that you advise the Shasta County Planning Department that the Signal Cottonwood Energy project will result in substantial air emissions or deterioration of ambient air quality; specifically, the project may result in a violation of a legally established state standard. In the light of the probable significant impact, the County will be required to prepare an Environmental Impact Report.[32]

1. *Treading Through the Local Bureaucracy*

Adams and Reid submitted numerous communications "[o]n behalf of the Northeastern California Building Construction Trades Council and the Northern California Pipe Trades Council"[33] to the APCD, the Shasta County Planning Department, and the County Board of Supervisors. Many of these were carefully answered by the appropriate agency, or by the Air Pollution Control Officer ("APCO"), sometimes finding that the submitted data were faulty or not pertinent.[34]

The Adams and Reid letters were very detailed[35] but not convincing to county authorities. Regulations required that the permit be acted upon with six months, but this proved difficult because of constant objections from Adams and Reid, all of which required answers by the authorities or rebuttal by Signal.

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32. Letter from Thomas Reid to Richard B. Booth, Shast County, Air Pollution Control Officer 2 (Apr. 3, 1986). Unless otherwise cited, all information relating to the *Signal* case comes from the case files.

33. Letter from Thomas Reid to Joe Hunter, Environmental Review Officer, Shasta County Planning Department, at 1 (May 30, 1986) [hereinafter *May 30 Reid Letter*].

34. In his reply to Reid, the APCO stated that the particulate data were in fact complete under the APCD rules, and that data were being collected in the Redding, California urban area, "not in the rural Anderson area 10 miles to the south," as Reid proposed. Letter from Booth to Reid (Apr. 7, 1986). Booth further explained that "[e]xtrapolation of the data is not defendable." *Id.* A memorandum from the APCO to the Planning Department further critically examines Reid's data and finds some of them either irrelevant or erroneous. Memorandum from Richard B. Booth, APCO to Bill Ramsdell, Planning Department (June 9, 1986).

35. *See, e.g.*, Letter from Thomas Adams to David Frank, Shasta County Counsel (Sept. 30, 1986) (18 pages) [hereinafter *Sept. 30 Adams Letter*]; *May 30 Reid Letter, supra* note 33 (11 pages).

Among the Adams-Reid concerns were claims of traffic congestion, imperfect waste disposal systems, water pollution, and questions of how high and wide wood storage facilities should be built. They also claimed that a thirty-six- or eighteen-megawatt generating capacity facility would cause less harm to the environment, but failed to mention that such small units could render the project economically unsound. Additionally, they alleged the existence of inadequacies in the draft environmental impact report ("DEIR") and final environmental impact report ("FEIR").[36] Adams summed up his posture by stating that the "most serious concern with this facility is that it threatens the health of the residents of Shasta County."[37]

Signal agreed to a three-month extension so that further study could be made pursuant to the California Environmental Quality Act ("CEQA"). When the study was completed and a public hearing held on September 11, 1986, the Shasta County Planning Department approved a conditional use permit for the project. On behalf of the unions and Shasta Concerned Citizens for Responsible Industry, for which Plumbers and Steamfitters Local No. 682 paid all fees, Adams appealed the granting of the permit to the County Board of Supervisors. The Board set aside the permit, and required that another environmental impact report ("EIR") be prepared.

Signal had an EIR prepared, and it was discussed at a hearing. The County Board then was prepared to approve the EIR and to issue the permit when Adams demanded another public hearing. Rather than argue this point, Signal's counsel asked the Board for a hearing without delay, and it was held on October 28, 1986. On November 20, 1986, the Shasta County APCD issued Signal's "Authority to Construct." The unions then turned to other agencies.[38]

2. *The California Superior Court*

Concerned Citizens petitioned the California Superior Court for the County of Shasta, Department III, to set the permit aside

36. These points were reiterated in the *Sept. 30 Adams Letter, supra* note 35.

37. Letter from Thomas R. Adams to Stephen Swendiman, Chairman, Board of Supervisors, Shasta County 1 (Nov. 12, 1986).

38. The history of these actions is reviewed in the decision of the California Superior Court. *See* Shasta Concerned Citizens for Responsible Indus. v. Board of Supervisors, 3 Civil No. C002302 (Cal. Super. Ct. filed Jan. 14, 1987). The concerned citizens group was financed by District 51 affiliates.

and offered additional evidence in support of their action. The court rejected their claim that they had been denied due process, finding that there had been ample opportunity for administrative hearings "and advantage [was] taken of them," and that any new evidence should have been presented at a prior hearing. The Concerned Citizens' petition, therefore, was denied.[39]

3. *The California Energy Commission*

On behalf of the unions, Adams turned to three other agencies. The first was the California Energy Commission ("CEC").[40] Even before the Authority to Construct was issued, the Pipe Trades complained to the CEC that Signal's plant generating capacity was not 49.9 megawatts, but more than 50. This would bring it under the CEC's jurisdiction: the CEC could require Signal to file a small power exemption or even could shut down the facility. The CEC docketed the case,[41] received briefs from the parties, and set up an investigation of Signal's plans. Signal was required to supply voluminous information despite the fact that members of the CEC staff were active participants in the Shasta County approval process, having provided testimony regarding fuel supply issues at the County Board's October 28, 1986, public hearing.[42]

The CEC's staff originally determined that the net generating capacity of the plant—that is, the gross generating capacity less the requirements for machinery, heating, other electrical and operating needs—was below 50 megawatts. The executive director so advised the company by letter on September 3, 1986, further stating that the CEC "would not file an order to Show Cause or otherwise impede construction of the Facility."[43] This ruling was based upon its investigation and the documents supplied by Signal, and was consistent with its well-recognized and long-standing methodology for such calculations.

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39. *Id.* The unions appealed this decision, but the appeal was dropped on June 8, 1988, by mutual consent of the parties following the final settlement of the case brought by the EPA, *see infra* Part III.A.5.

40. The CEC is part of the State Energy Resources, Conservation and Development Commission. *See generally Cut State Income Tax, Wilson Says*, N.Y. TIMES, Jan. 6, 1994, at A13.

41. The case was docketed as No. 86-C&I-7. The complaint filed by the Adams firm was dated November 7, 1986.

42. *See* Answer of Respondent Signal Energy Systems, Inc. at 7, Signal Energy Systems, Docket No. 86-C&I-7 (Cal. Energy. Comm'n Dec. 5, 1986).

43. *Id.*

Then the CEC employed a consultant who assumed that manufacturers of small generators build a "reserve margin" into them and, therefore, that Signal's net generating capacity exceeded 50 megawatts. Signal quickly pointed out the unsubstantiated character and novelty of the consultant's findings. The small generator business is highly competitive, and there is no reason for manufacturers to raise their costs by adding capacity above the nameplate-rated designation. Moreover, if the company ran the generators above its rated capacity and a breakdown or malfunction occurred, no warranty would apply. In addition, Signal found some clear errors in the staff and consultant data which reduced their capacity findings.[44]

Signal's testimony and briefs were perhaps more important to the CEC's decision. These clearly showed that the "reserve margin" concept had never been utilized previously by the CEC in determining generating capacity for purposes of its jurisdiction, and that CEC regulations did not permit the use of a standard so "theoretical and difficult to quantify as 'reserve margin.'"[45]

Signal had relied on the original staff decision and had proceeded to obtain the necessary permits at public hearings in which the CEC was represented. Since the original decision, no new information had been uncovered to support a finding of greater generating capacity. Therefore, Signal counsel argued, the doctrine of estoppel and "fundamental principles of fairness" would apply and "preclude the Commission from changing the methodology initially used to determine that the Facility's net generating capacity is under 50 megawatts."[46] Signal promised to demonstrate at a CEC hearing that "the related, but distinct, doctrines of laches and vested rights are applicable in this case as well."[47]

The CEC decided not to risk a decision supporting such a faulted case as it raised with the "reserve margin" gambit. It returned to its original less-than-50 megawatt determination and dismissed the unions' petition.

44. *See* Response of Respondent Signal Energy Systems, Inc. to CEC Committee Request for Argument and Evidence at 13, Signal Energy Systems, Docket No. 86-C&I-7 (Cal. Energy Comm'n Jan. 7, 1987).

45. *Id.* at 18.

46. *Id.* at 19.

47. *Id.*

4. *The California Air Resources Board*

On June 8, 1987, Adams' partner, Ann Broadwell, wrote the California Air Resources Board ("CARB") to determine whether it would intervene in the remand by the U.S. EPA, which is discussed in the next subsection. On July 3, 1987, the CARB replied that it intended "to provide comments on the District's analysis if requested by the EPA." Region IX, EPA, did request comments.

On September 9, 1987, the Shasta APCD addressed a strong letter to the CARB stating that the CARB's interjection of "itself into the District permitting process" was in violation of permitting protocols. The APCD demanded that the CARB refrain from commenting on the Signal issues and from performing Region IX's work at California taxpayers' expense. It warned that if the CARB continued its efforts, cooperation between the two bodies would cease. The CARB did comment to the EPA regarding Signal's authority to construct, but approved the actions of the Shasta APCD.[48]

5. *The U.S. Environmental Protection Agency*

On November 26, 1986, shortly after the Signal construction was approved by the Board of County Supervisors, Broadwell asked the EPA how to appeal the construction approval on the grounds that the federal Clean Air Act provisions were not being met. Broadwell filed the appeal December 11, 1986, and the EPA docketed the case as No. 86-7.

Both counsel for Signal and for Shasta County objected to an EPA review. They argued that the Shasta County unit was operating under delegations-of-authority agreements with EPA that provided no basis for such a review. They asserted that a review would set a precedent that not only further would discourage construction, but would encourage even more delays and litigation.[49]

48. *See* Letter from Wayne A.Blackard, Chief, New Source Section, Air Management Division, EPA Region IX to Raymond E. Menebroker, Chief, Project Review Branch, Stationary Source Division, CARB (Sept. 8, 1987); Letter from Booth, Shasta AQMD, to Menebroker (Sept. 9, 1987); Letter from Menebroker to Blackard (Sept. 30, 1987); Letter from Menebroker to Broadwell (July 3, 1987).

49. *See* Letter from David R. Frank, Esq., Shasta County Counsel, to McCallum (Jan 28, 1987); Letter from Christopher W. Garrett, Signal Counsel, to Robert W. Bergstrom, Esq., EPA, Region IX (Jan. 27, 1987). The opposite position was, of course, taken by the unions. *See* Letter from Ann Broadwell to McCallum (May 1, 1987).

On May 6, 1987, the Shasta APCO, who had been most supportive of Signal's project, requested that the permit be remanded to the Shasta Air Quality Management District ("Shasta AQMD") for further analysis of particulate matter and oxides of nitrogen emissions. When Signal's attorney raised no objections to the proposed remand but warned that Signal "in no way waives any of its factual and legal arguments previously advanced in this matter,"[50] the EPA Administrator remanded the permit to the Shasta AQMD "for relevant *federal* permit issues raised by petitioner Pipe Trades Council."[51] Broadwell then demanded that the reconsideration be subject to public comment.[52] The APCO refused to open the analysis of the permit to public comment "unless an amendment would relax a standard or limitation that would cause a significant effect on air quality."[53] Shasta County authorities reissued Signal's Authority to Construct. The EPA responded by requesting comments from Shasta County authorities, the Pipe Trades Council, and EPA Region IX.[54]

On October 6, 1987, the Shasta APCO, in a detailed response, advised the EPA that the District completely rejected the claims of the Pipe Trades Council that the various equipment and procedures being installed by Signal were inadequate. A detailed analysis of the equipment and procedures and the CARB support letter were attached to the APCO's memorandum to the EPA. The EPA reply on November 6 to the Shasta District stated that the EPA had found several shortcomings in the Shasta District's approval, and announced the EPA's intention to assume jurisdiction. The APCO responded:

> Our response to Region IX [EPA] is attached, and I believe it would benefit both you and the Administration to review the entire response since I think it clearly points out a great many gross errors and misrepresentations on the part of Region IX staff. I believe that an informed, unbiased review of the data will show that the Shasta County A.Q.M.D. has more than adequately addressed the . . . issues and that the Authority to Construct as amended is both proper and defensible.[55]

50. Letter from Garrett to McCallum (May 18, 1987) (responding to Letter from McCallum to Broadwell & Garrett (May 12, 1987) (stating that the permit would be remanded if there were no objections) [hereinafter *May 12 McCallum Letter*]).

51. Letter from McCallum to Broadwell & Garrett (July 24, 1987) (citing *May 12 McCallum Letter*).

52. *See* Letter from Broadwell to Booth (June 17, 1987).

53. Letter from Booth to Broadwell (June 18, 1987).

54. *See* Letter from McCallum to Broadwell & Garrett (July 24, 1987).

55. Letter from Booth to McCallum (Nov. 6, 1987).

By this time it was clear that the EPA was determined to accept union claims about alleged deficiencies in the project. When Signal (by now Wheelabrator) refused to stop construction and risk losing its Authority to Construct, which was valid for only two years, the EPA sought an injunction and civil penalties in federal district court.[56] The EPA also declared that Signal "began and is continuing to construct, a biomass-fired boiler . . . without an effective prevention of significant deterioration ("PSD") permit in violation of §§ 7413(b) and 7477 of the Clean Air Act."[57] The EPA alleged that the Shasta District's permit did not include "approvable procedures for preventing the significant deterioration of air quality" and that "the Shasta AQMD permit decision has never become effective."[58] It requested a civil penalty of $25,000 per day from Shasta for each day of "violation," as well as a permanent injunction forbidding construction.[59]

Faced with long litigation and possible interruption in its operation of the facility, Signal negotiated a consent decree with the EPA. Signal agreed to replace its planned system, which had been used in cogeneration plants built earlier in California, with a new process developed by Exxon Chemical that involved installing an ammonia injection system on all three of its boilers. Signal also agreed to pay a $100,000 fine.[60]

6. *The Final Outcome*

The Shasta Cottonwood facility was completed and was built with open shop contractors. According to the District 51 video, the ammonia injection system was installed by a union contractor.[61] A union adherent wrote that Signal agreed to build six future projects with union labor,[62] but not even District 51 reports support this claim.[63] Wheelabrator, formerly Signal, won a contract for another biomass plant in Delano, northeast of Los Angeles. The union report claims that there was some discussion of

56. *See* United States v. Signal Energy Sys., No. 88-0333 (E.D. Cal. June 8, 1988) (Complaint for Injunctive Relief and Civil Penalties, filed Nov. 1987).

57. *See* 42 U.S.C. §§ 7401-7479 (1977).

58. *Id.*

59. *See id.*

60. *See* United States v. Signal Energy Systems, No. 88-0333 (E.D. Cal. June 8, 1988) (Consent Decree, June 8, 1988).

61. *See Union Video, supra* note 22.

62. *See* Bedford, *supra* note 22, at 93.

63. *See* TOM HUNTER & RAY FOREMAN, PARTICIPATION IN THE PERMIT PROCESS 3 (1987). Foreman was then the executive of Los Angeles District 16, UA.

constructing the facility under union contract. Wheelabrator, however, sold the business before any construction began.

B. *The Significance and Results of the Signal Case*

Even though the unions won only the ammonia injection work, the Signal case proved significant for the Pipe Trades Council and District 51 because it demonstrated the tenacity with which the unions could pursue the agency labyrinth and the extent to which some of these agencies, state and federal, sought to aid the union campaign. In the unions' video, Hunter admitted that although they knew that they "had a loser" half-way through the case, they kept on to impress others. He stated:

> Our deal then was to keep on fighting and to make everyone understand that that was the deal with us . . . that there was simply no end to it. We would just keep on fighting.[64]

The experience may well have convinced a number of companies less steadfast than Signal that it would be easier in the short run to utilize union labor than to undergo the harassment which District 51 and government agencies could inflict upon them. General Electric built a small cogeneration facility in Burney, also Shasta County, with union workers instead of its open shop affiliate, QPI. District 51's video and our investigations indicate that, in the Bakersfield area, action by District 51 led the city council to overturn the approval for Power Systems Engineering, Houston, Texas, to construct a 48-megawatt plant. The project then was approved after the developer signed a project agreement with Local 460 and made some environmental changes. Eight other facilities were built under project agreements.

Similar events occurred involving the GWF Cogeneration plants in Contra Costa County and in Kings County. A thermal energy project in San Joaquin County signed early with the building trades unions. In these cases, neither District 51 nor other construction unions submitted environmental comments to state or federal agencies. An Orange County project went union after District 16, Los Angeles and Southern California, began utilizing the Adams firm, which, according to the video, "examined the air and waste discharge issues and closely monitored the project,

64. *Union Video, supra* note 22.

including extensive discussion with regulatory authorities." Our investigations found other examples of this union success story.[65]

C. *The Petroleum Companies*[66]

Given the size of the petroleum companies that have refineries in the San Francisco and Los Angeles areas, District 51's record of pressuring them is significant.

1. *Chevron*

Chevron, the largest industrial company headquartered in California,[67] has refineries in Richmond, in the San Francisco Bay area, and in El Segundo, a suburb of Los Angeles. It also has properties in other parts of the State. Chevron's first brush with the plumbers and pipefitters came as a result of the development of properties in the Bakersfield area. Intervention by District 51 affiliates and local "citizen groups" with strong union affiliations resulted in unionization of the plumbing work in a large housing development.[68]

Later, Chevron declined to sign a project agreement with District 51 for construction of a cogeneration facility at the Richmond refinery, and District 51 opposed the project before the CEC. Construction was postponed for three years when Pacific Gas & Electric ("PG&E") reduced its rates, but before the cogeneration facility was built, Chevron signed with a union contractor.[69] An open shop mechanical insulation firm, Petrochem Insulation, Inc., sued the unions for antitrust violations. Although Petrochem had worked satisfactorily for Chevron on previous jobs and was denied the opportunity to bid on this one, it lost the case in the federal courts.[70]

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65. These summaries are based upon union claims and reports, and investigations which show that they are substantially correct.

66. Unless otherwise indicated, information for these cases emanates from the documents in the cases, union publications, and interviews with user and contractor personnel.

67. In 1994, Chevron ranked fourth in size among U.S. petroleum companies and eighteenth among all companies in the United States, with sales of $31 billion and 45,758 employees. *See The Fortune 500*, FORTUNE, May 15, 1995, at F-1, F-58. The 1994 data are not comparable with previous years because *Fortune* integrated its "service" and "industrial" groups.

68. *See Union Video*, *supra* note 22.

69. Pacific Gas & Electric had opposed the project because it feared a loss of power sales.

70. *See* Petrochem Insulation, Inc. v. Northern Cal. & N. Nev. Pipe Trades Council, 139 L.R.R.M. (BNA) 2956 (N.D. Cal. 1992), *aff'd without opinion*, 8 F.3d 29 (9th Cir. 1993),

The Federal Clean Air Act requires oil refineries located in areas with severe air pollution to reformulate cleaner-burning gasoline by 1995. In California, regulators have mandated that by 1996 only cleaner fuels be refined statewide.[71] In 1993, Chevron agreed to have this "retrofitting" work at both Richmond and El Segundo done by union contractors. Given the highly union environment in Richmond, it is likely that this job would have been done by union contractors even without District 51 pressures.

The contract governing the Richmond project limits the scope "only to that new construction work awarded to and performed by the signatory Contractors during the term of this Agreement."[72] It also provides for no limitation on the choice of materials or "full use and installation of equipment," but applies the "appropriate national or local agreements" to issues of fabrication.[73] The agreement provides that the work force will be composed of 25% to 33% apprentices and states that rates for subjourneymen (helpers) will be negotiated if insufficient union referrals are available.[74] It requires the contractors to utilize the union referral system for all manpower below the level of general foreman, giving the unions almost complete control of recruitment even when they have difficulty supplying manpower. If the unions cannot produce the necessary employees within forty-eight hours, the company may hire from other sources, but any such personnel are merely temporary workers who "shall be replaced by qualified journeymen when available."[75]

Brown & Root, the country's largest all-open-shop contractor,[76] was led to believe that it would win the El Segundo retrofit

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cert. denied, 114 S. Ct. 1293 (1994). Further discussion of this case is found *infra* Part IV.A. The facts of the case are found in the briefs and opinion in the case.

71. *See Refineries Retooling to Create Bay Area Jobs*, Daily Lab. Rep. (BNA) No. 41, at A-15 (Sept. 13, 1993).

72. Project Agreement for the Chevron Richmond Refinery Reformulated Gasoline and Refinery Upgrade Projects, Negotiated between Contra Costa County Building & Construction Trades Council and Affiliated Local Unions and Bechtel Construction Company and Signatory Contractors, art. 2.1, at 2.

73. *Id.* art. 2.4, at 2.

74. *See id.* art. 15, at 15.

75. *Id.* art. 13, at 14.

76. In 1994, Brown & Root ranked fifth among all U.S. contractors with a total revenue of $2.6 billion. *See The Top 400 Contractors*, ENGINEERING NEWS REC., May 22, 1995, at 46. The latest rankings are not comparable to previous ones because *Engineering News Record* ranked contractors on total revenue instead of dollar amount of new contracts. Moreover, several large, privately-owned contractors declined to participate in providing data for 1994 because they do not publicize their sales revenue data.

job and that the contract would be negotiated rather than bid. However, the job went to a union contractor.[77]

In October 1993, while the permit for the El Segundo clean fuel project was going through the state bureaucracy, the California South Coast Air Quality Management District ("SCAQMD") gave Chevron permission to prepare the site prior to the issuance of the final Authority to Construct. Just as in the *Signal* case, Pipe Fitters Local 250, represented by Adams, petitioned the federal EPA to intervene. Adams claimed that "there were severe environmental impacts," including "possible soil contamination . . . potential for toxic emissions," and "release of lethal gas." Adams also stated "that the pipe fitters have had labor difficulties with Chevron . . . " and "major concerns about Chevron's use of non-union, out-of-state workers."[78]

The EPA ordered Chevron to cease work immediately.[79] Chevron appealed to the U.S. Court of Appeals, Ninth Circuit, which stayed the EPA order indefinitely. The EPA was unrepentant, claiming it would fine Chevron $25,000 per day for the three months during which the site work was ongoing.[80] It has not done so, and the Authority to Construct has been issued.

2. *Shell*

This Dutch-British company[81] operates refineries in Martinez, in the San Francisco Bay area, and Wilmington, a suburb of Los Angeles. Shell, like Chevron, decided to utilize union contractors for the clean fuel retrofitting at its Martinez refinery. The company was concerned about delays in the permitting process in heavily union Contra Costa County where Martinez is located, and it also believed that the unions would have the best opportu-

77. Based upon interviews with Brown & Root personnel, in Houston (Oct. 6, 1993) and by telephone (Mar. 24, 1994).

78. Frank Clifford, *Ban Lifted on Chevron Plant Project*, L.A. TIMES, Feb. 4, 1994, at 3B. Chevron had awarded a maintenance contract to an open shop contractor, but there is no record of large numbers of out-of-state workers.

79. *See id.*; *Chevron Told by EPA to Halt Refinery Project*, N.Y. TIMES (nat'l ed.), Oct. 11, 1993, at 19; *EPA Alleges Rules Violations by Chevron Units*, OIL & GAS J., Oct. 11, 1993, at 27.

80. *See* Clifford, *supra* note 78; *see also Gas Project Halt Battled*, ENGINEERING NEWS REC., Nov. 8, 1993, at 15 (discussing a similar stop work order issued by the EPA against Unocal Corp. the month after the issuance and judicial stay of the order to Chevron).

81. Shell is the second largest petroleum company in the world. In the United States, Shell in 1993 ranked eighteenth among industrial corporations and sixth among petroleum companies, with sales of $20.9 billion, and 22,212 employees. *See The Fortune 500*, FORTUNE, Apr. 18, 1994, at 220, 270. 1993 is the last year *Fortune* made the data on Shell's U.S. operations available separately because the U.S. operations have been integrated fully into the worldwide company.

nity to supply a sufficient labor force at a time when all refineries in the area were constructing major projects. According to Shell's Clean Fuels Project superintendent, the unions would be "going to Arizona and Nevada and far beyond" to supply personnel for the work.[82] Here again is an example of unions planning to recruit "outsiders" for jobs while maintaining that this is something exclusively done by open shop contractors.

The contract covering the retrofit at Martinez mirrors that of Chevron in most ways. It gives unions control of hiring for the retrofit job, but limits the union job to the retrofit and specifically excludes union jurisdiction outside the retrofit area.[83] Maintenance at the Martinez refinery, which does not require special permits, is performed open shop, and other work is done on a "merit shop" basis—that is, the lowest qualified bidder, whether union or open shop, gets the job.[84]

3. *Exxon*

The Exxon Corporation, the world's largest petroleum company,[85] has a relatively minor presence in California. It has a refinery at Benecia in the San Francisco Bay area that was built in the 1960s and, unlike other major refineries in the State, has never been unionized.

Exxon also has used mostly open shop companies in the past both for construction and maintenance. Like Shell, however, Exxon was concerned about possible permitting delays and skilled labor recruitment. It gave the retrofitting contract to Parsons Constructors, Inc., the union arm of the Parsons Group.[86] Parsons is a party to the National Construction Stabilization Agreement,[87] the key provisions of which are not materially different

82. *California Unionized Construction Workers Get Big Boost from Environment Regulations*, Daily Lab. Rep. (BNA) No. 223, at A-11 (Nov. 18, 1992).

83. *See* Shell Clean Fuels Project Labor Agreement between Scarth-Lyons & Associates, Coordinator and Contra Costa Building & Construction Trades Council, art. 2.1, at 2 (Nov. 5, 1992 to Dec. 31, 1998).

84. *See id.* art. 13, at 18; *see also id.* art. 15 (listing other significant aspects of the contract). Information also was gathered from interviews in Houston, Texas (Oct. 7, 1993).

85. In 1994, Exxon was the third largest industrial company in the United States, with sales of $97.8 billion and 86,000 employees. *See The Fortune 500*, *supra* note 67.

86. In 1994, the Parsons Group was the fifteenth largest American construction organization, with total revenues of $1.3 billion. *See The Top 400 Contractors*, *supra* note 76.

87. This agreement is between approximately ten large union contractors, the Building and Construction Trades Department, AFL-CIO, and approximately twelve building trades unions. It lays down basic conditions of work and provides for the payment of locally negotiated wages and benefits and for other local supplements.

from those negotiated for Chevron and Shell. Appeal of contract disputes, however, is made to national officials of the parties in Washington, D.C., which can be an advantage in mitigating local pressures and local union politics.

4. *Atlantic Richfield*

Although Atlantic Richfield ("ARCO") is smaller than those companies already discussed,[88] it has become "the top low-cost gasoline marketer in the West."[89] Its principal refinery, the ARCO Watson facility, is in the Los Angeles area. In 1986, ARCO built a cogeneration plant at its Watson facility. There was some opposition to the project, with a "Concerned Citizens Local Jobs Committee," which seemed to be a union front, appearing before local public hearings and the CEC,[90] but the job proceeded with an open shop contractor.

RCO completed the retrofitting of its refinery for clean fuel in 1993. The general contractor selected for this project was Brown & Root Braun, a division of Brown & Root. ARCO made a deal with the pipefitter unions by agreeing that Brown and Root and Cherne Contracting Company, a union company in Minneapolis, would each receive 40% of the project, with the remaining 20% awarded on a merit shop basis. The pipefitter unions, however, demanded a higher percentage of the work for union contractors. ARCO declined, and a settlement resulted. ARCO maintained the original division of work and promised Cherne work equal to that of an open shop builder if a hydrogen unit were built on the property, provided Cherne met certain productivity goals.[91]

88. In 1994, ARCO was the seventh largest petroleum company and fifty-third largest company in the United States, with sales of $17.2 billion and 25,100 employees. *See The Fortune 500, supra* note 67, at F-3, F-58.

89. *ARCO Picks A New Chief*, N.Y. TIMES, Mar. 29, 1994, at D5.

90. The case record includes copies of two letters, dated August 1 and August 4, 1986, addressed to the CEC raising the usual union questions about environment, prevailing wages, out-of-state workers, and various open shop contractors. There is no union designation on these copies.

91. This information is based on documents in the case record, including an agreement on disposition of work.

5. *Unocal*

Unocal is a regional company,[92] but it is one of the largest gasoline retailers in California. It operates refineries in Rodeo, near San Francisco; in Santa Maria, San Luis Obispo County; and in Carson and Wilmington, which are in the Los Angeles area. In 1985, Unocal contracted with Fluor Daniel[93] for construction at its Santa Maria facility. The work was done open shop, and despite union protests and picketing, it proceeded without any major problems.[94]

In 1990, Unocal had a second project at Santa Maria, the purpose of which was to increase the efficiency of the facility and simultaneously to reduce odors and air pollution. Unocal retained Brown & Root as the contractor. Districts 51 and 16 intervened and pushed hard for passage of a local prevailing wage law, modeled after the state's "Little Davis-Bacon" law.[95] Brown & Root, as usual, was accused of planning to import labor instead of employing local personnel at a time when unemployment existed in the area. Except for the construction unions, local officials and residents were generally favorable to the project because of the increase in employment and decrease in odors that would result.[96]

To settle the dispute, the San Luis Obispo County Department of Planning and Building required a local hiring plan that maximized local employment before it would grant building permits. Brown & Root provided a detailed plan, promising to employ and train as many local residents as possible. When the contractor presented the wage structure to be paid and showed that it provided an impressive list of employee benefits, the Department issued the permits, and Unocal completed the project without serious problems.[97]

92. In 1994, Unocal was the twelfth largest petroleum company and the 163d largest company in the United States, with sales of $7.1 billion and 14,568 employees. *See The Fortune 500, supra* note 67, at F-7, F-58.

93. Fluor Daniel is a merger of Fluor, formerly a union contractor, and Daniel, an open shop contractor. In 1994, it was the largest contractor in the United States, with total revenue of $6.6 billion. *See The Top 400 Contractors, supra* note 76. An estimated 80% of Fluor Daniel's work in the United States is done open shop.

94. Information is from company interviews (Jan. 1994).

95. Some California municipalities did adopt such laws, which covered private as well as public construction, before they were found to be preempted by federal and state legislation. For comment and cases, see *supra* note 10.

96. Information is from a Unocal interview, Los Angeles (Jan. 3, 1994).

97. *See id.*; documents in the case record, including Brown & Root's presentation to meet conditions for permit.

In June 1992, a group called "Labor for the Public Interest"[98] sued a Unocal subsidiary company charging violations of the Clean Water Act.[99] The suit alleged that since 1989 Unocal had been illegally polluting San Pablo Bay (an extension of San Francisco Bay) from its refinery in Rodeo with various illegal discharges. The group sought an injunction against continued violations and up to $25,000 in civil penalties for each violation. Unocal stated that the charges were without merit. The case was settled on November 19, 1993, by a consent decree in which Unocal agreed to make certain changes in its testing procedures for affluent discharges.[100] The company claimed that it was planning to make the changes in any case and that no extra cost would be incurred. Perhaps the key to the case is that Unocal is utilizing some open shop construction companies for maintenance, but the settlement, according to the company, involved no promises regarding the use of union or non-union labor.[101]

Unocal had applied to the SCAQMD for an Authority to Construct at its Wilmington and Carson facilities[102] where a retrofit for clean fuel was scheduled. Meanwhile, like Chevron, it began site work with SCAQMD's full knowledge and permission. Adams, representing a pipefitters local union, protested to the EPA, which ordered the work stopped. Adams claimed that nonunion, out-of-state employees were being used (not an illegal act, even if true) and that Unocal's work "posed environmental hazards."[103] Like Chevron, Unocal had the EPA order stayed indefinitely by the Ninth Circuit.[104]

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98. The members of "Labor for the Public Interest" were all members of plumbing and pipefitting unions. Its president was Thomas Hunter, then executive director of District 51.

99. *See Unions File Environmental Suit Against Union Oil of California*, 38 Construction Lab. Rep. (BNA) 500 (1992) (discussing Labor for the Pub. Interest v. Union Oil, No. C92-2531 (N.D. Cal. Nov. 19, 1993) (Complaint filed, June, 6, 1992)).

100. *See* Labor for the Pub. Interest v. Union Oil, No. C92-2531 (N.D. Cal. Nov. 19, 1993) (Consent Decree, Nov. 19, 1993).

101. Information is from telephone interviews, company and other confidential sources (Apr. 21, 1994).

102. The Carson facility was recently purchased from Shell. It is part of what was a total operation and is adjacent to the part that Shell continues to operate. Carson and Wilmington are very close to each other.

103. Frank Clifford, *Preliminary Work on Unocal Plants Is Unauthorized, EPA Says*, L.A. TIMES, Oct. 27, 1993, at 3B. *See generally Unocal, EPA at Odds Over Clean Fuels Permit*, OIL & GAS J., Nov. 1, 1993, at 32.

104. The Court of Appeals acted in Nov. 1993.

6. *Petroleum—Final Comment*

The union's environmental campaign targeted other petroleum companies as well. In 1989, Texaco[105] provisionally selected Brown & Root for a sulfur removal project at its Wilmington refinery. Union intervention caused delay and expense, and eventually the job was done by a union contractor.[106] In 1993, Tosco, which is near Rodeo on San Pablo Bay, agreed to do the retrofitting at its refinery with a union contractor.[107] It is unlikely that District 51 and its allies have overlooked any construction by a petroleum company in California that required permitting. As long as the union tactics are not found illegal and major corporations prefer to avoid costly union and environmental agency battles, the union success in gaining work seems certain to continue.

D. *The Campaign Against TIC Holdings, Inc. ("TIC")*

TIC, originally known as The Industrial Company, is a major open shop industrial constructor, which has been very active in western States and is headquartered in Steamboat Springs, Colorado.[108] TIC first encountered the District 51 program in the late 1980s at the Freeport-Geothermal project in California. As a result of union intervention and obstruction at the air quality control permit hearings, TIC was forced to cede part of the job to Valley Engineering, a union contractor.[109]

1. *China Lake Cogeneration*

Speaking on the District 51 video, John Michelson, business manager, Pipefitters Local 460, stated in regard to the China Lake, California, geothermal project:

> They had 1,500 nonunion workers on the job. They were in process. They had already completed two plants.As we went through the permitting process, looked at all of the environ-

105. In 1994, Texaco was the third largest petroleum company and the sixteenth largest company in the United States, with sales of $33.8 billion and 30,042 employees. *See The Fortune 500, supra* note 67.

106. Information is from documents in the case and telephone interview with Brown & Root personnel (Feb. 17, 1994).

107. *See Major Refinery Work Planned,* ENGINEERING NEWS REC., Sept. 20, 1993, at 33. In 1994, Tosco was the fourteenth largest petroleum company and the 182d largest company in the United States with sales of $6.4 billion and 3,613 employees. *See The Fortune 500, supra* note 67, at F-7, F-58.

108. In 1994, TIC was number 40 in *The Top 400 Contractors, supra* note 76, with total revenue of $527 million.

109. Information is from TIC.

> mental issues, looked at all of the political issues, they removed the 1,500 nonunion workers from the job in the middle of it, and they have replaced them with 500 union workers and the job is proceeding ahead of schedule at this time. We just got through successfully building six cogens, two on each site for a company called PS&E. As a result, they're building six more. They came to the building trades because of the quality work that we give them. And those are now starting and they're all union.[110]

TIC, the original contractor on the job, tells a different story. The CEC initially was sympathetic to the unions, but TIC managed to overcome the agency's procedures and completed the first four units for a contract price of approximately $43 million. TIC reported that it was not permitted to bid on the remaining projects. It alleges that these projects were far from successful and resulted in claims of $60 million against the engineers and constructors.[111]

2. *The TAMETIC Program*

The Western States Pipe Trades Council has been described as a voluntary group of UA local unions in eleven western States, consisting of District 51's former affiliates and other UA local unions.[112] Following the adoption of a resolution at the November 1991 UA national convention urging a "national campaign" against TIC,[113] the Western States Council, with the assistance of at least one local building trades council, began "what amounts to a corporate campaign against The Industrial Company."[114] The program originally was known as TAMETIC, derived from "tame TIC."[115] It was developed and coordinated by James L. Wil-

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110. *Union Video*, *supra* note 22.

111. *See* Interview with TIC executive (May 22, 1990).

112. This description of the Western States Pipe Trades is that of James L. Wilson, the executive of TAMETIC (now LASER). *See* Deposition of James L. Wilson at 20, TIC—The Industrial Company v. Tame T.I.C., No. C92-N-781 (D. Colo. 1995) [hereinafter Wilson Deposition]. For the eleven States included in the Western States Pipe Trades headed by Hunter, see *supra* note 20.

113. *See* UA JOURNAL, Nov. 1991, at 92. This issue contains the proceedings of the UA 1991 convention.

114. *Pipe Trades "TAMETIC" Program Aimed at The Industrial Company*, 39 Construction Lab. Rep. (BNA) 159 (Apr. 15, 1992). For an explanation and analysis of union corporate campaigns and related activities, see Herbert R. Northrup, *Union Corporate Campaigns and Inside Games as a Strike Form*, 19 EMPLOYEE REL. L.J. 507 (1994).

115. As a result of litigation charging trademark infringement, *see infra* Part IV.G, the Western States Pipe Trades no longer uses the "TAME TIC" or "TAMETIC" names, but now calls their anti-TIC program "LASER," for "Legal and Safety Employment Research."

son, a former local union official of the Boilermakers' union[116] who reportedly was involved with District 51 in the *Signal* case. The anti-TIC program is headquartered in Gridley, Butte County, California. It has been extended to several other States in addition to the eleven in the Western Council.

TAMETIC's approach, as outlined in Exhibit 1,[117] has been two-fold: an expansive publicity program aimed at public officials and private industry, and pressure on users and public administrators not to utilize the company's services. Users are promised permitting difficulties if they ignore the union "advice," political pressure is put on administrators and elected officials to reject TIC bids and anti-TIC bulletins are circulated. The typical TAMETIC bulletin claims that the company has a poor safety record, pays low wages, offers few benefits, does inferior work, hires few, if any, local personnel, fails to hire female and minority subcontractors as required, and is constantly involved in litigation over its work.[118]

The anti-TIC program operates similarly to that of District 51 when pressuring private or public users not to utilize this contractor. For example, in 1992, Amax Gold chose TIC to build a mine for the Hayden Hill property belonging to its subsidiary, Lassen Gold Mining, Inc. Wilson allegedly advised Amax that the union would hold up the project at the permitting stage unless the plumbing and pipefitting work was subcontracted to a union firm, and unless Amax agreed not to utilize TIC in the future. Amax agreed to the former request, and denies it agreed to the latter.[119]

Outside California, UA local unions 208 in Denver and 375 in Fairbanks, Alaska, are among those party to the anti-TIC campaign. TAMETIC was able to force TIC off a major project at the

116. The official name of this union is the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers. Wilson described his role in TAMETIC (LASER) as "solely in Control of LASER and its operations." Wilson Deposition, *supra* note 112, at 161.

117. Wilson testified that he wrote and personally typed the program outlined in Exhibit 1. *See id.* at 168 & Exhibit 38.

118. The sources for the TAMETIC information are the publications of the union and company unless otherwise cited.

119. *See* Letter from Arthur R. DePalma, Regional Director, NLRB Region 27, to Lawrence W. Marquess, Attorney for TIC (June 23, 1993) (in regard to Northern Cal. & N. Nev. Pipe Trades Dist. Council No. 51, N.L.R.B. Case No. 27-CC-826 (1993)); *see also* Letter from Robert E. Allen, Associate General Counsel, Division of Advice, NLRB to DePalma (Jan. 27, 1993) (in regard to the same case) (copies of these letters available from the National Labor Relations Board).

Denver airport, attempted to do the same at a Coos Bay, Oregon project,[120] and actively has fought permits in a number of other States where TIC has been designated the contractor. UA President Boede considered the TAMETIC program so successful that he wrote a newsletter extolling it, headlined *Taming Non-Union Contractors Is Within Our Reach.*[121]

At the Denver Airport, the political authorities rebid the project and removed TIC from the job despite a detailed investigatory report by its own department of public works that cast doubt on TAMETIC's allegations. That report concluded that the anti-TIC claims were "vague, general in nature," "rarely ever deal with specifics" and "constantly repeat the same allegations over and over again . . . that there are excessive injuries on TIC jobs, TIC constantly sues customers, TIC does substandard work, and TIC does not pay prevailing wages."[122] As the Construction Labor Report stated, "investigations by the Denver department of public works of safety and employment allegations against TIC found 'no evidence to indicate that any of these allegations [by TAMETIC] give a true picture of TIC.'"[123]

A similar situation occurred in San Bernardino, California, where TIC was involved in a joint venture to construct a water project valued at $26 million. The general manager of the city water department investigated the allegations of TAMETIC and replied to an attorney apparently representing TAMETIC:

> The findings of our investigations conclude that Western Summit/TIC is a valid and well-established joint venture made up of two (2) responsible, financially sound, and major corporations that have worked in California for the past four years .... The bid documents we received were all in order and all signatures are valid. We have also concluded that [both companies] . . . have better-than-average safety records. Lastly, Western Summit has indicated that their previous California projects average a 50% local labor force; TIC indicates theirs to be 85%—as a joint venture they have assured us they will strive to at least meet these averages for the PHR Project.In

120. *See Plumbers Oppose Oregon Port Project on Environmental Grounds, supra* note 25.

121. *See* Marvin J. Boede, *Taming Non-Union Contractors Is Within Our Reach*, UA GEN. OFFICERS' WASH. REP., Feb. 28, 1992.

122. Memorandum from Byron J. Haze, Project Director, to William E. Smith, Manager of Public Works and Randy Alexander, Director of Contract Administration, Department of Public Works, City and County of Denver, at 11 (Oct. 30, 1991) (on file with Dr. Northrup).

123. *Pipe Trades "TAMETIC" Program Aimed at The Industrial Company, supra* note 114, at 161.

> summary, the Water Department has determined the allegations . . . to be unsubstantiated and of no consequence to a recommended contract to the Western Summit/TIC joint venture. . . . We are . . . pleased that we now have a greater level of confidence, as well as expectations, for the future performance of these firms.[124]

Despite this report, union allegations triumphed.

> City contracting agency staff investigated safety and employment claims against TIC in documents filed by TAMETIC, found the claims were without substance, and recommended that the project be awarded to the joint venture. . . . However, at the political level . . . the union letter writing campaign had an impact. The city decided to rebid the project . . . .[125]

In the rebidding process, the specifications were altered, and a union contractor, now aware of the TIC joint venture bid, allegedly was able to bid lower and win the work.[126]

In March 1993, the ENR reported that the unions were "challenging about 25¢ of the firm's projects."[127] One challenge involved environmental and other objections in both Wyoming and South Dakota to a proposed coal-fired power plant to be built for the Black Hills Power and Light Company. The ENR reported that "TAME TIC opposes the project in part because the utility plans to hire a nonunion contractor . . . ."[128] Wilson was quoted as stating that the signing by Black Hills of a union project agreement "could prompt TAME TIC to withdraw its opposition."[129]

TIC has responded to the union campaign on the public and customer relations fronts and in the courts. Whenever the unions issue a brochure attacking TIC, the company releases a point-by-point factual rebuttal. Union claims of a poor safety record are compared with TIC's published safety record, which indicates safety superior to that of the construction industry as a whole.[130]

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124. Letter from Bernard C. Kersey, General Manager, Water Department, City of San Bernardino, to Pauline M. Sloan, Attorney at Law (Jan. 23, 1992) (on file with Dr. Northrup).

125. *Pipe Trades "TAMETIC" Program Aimed at The Industrial Company*, *supra* note 114, at 161.

126. *See Campaigns Try to Discredit Growing Nonunion Firms*, ENGINEERING NEWS REC., May 18, 1992, at 21.

127. *Pro Union Group Fights Open-Shop Powerplant*, ENGINEERING NEWS REC., Mar. 22, 1993, at 20

128. *Id.*

129. *Id.*

130. For example, TAMETIC claimed at a hearing involving a Nevada mine project in 1992 that TIC's safety record was poor and that at another mine project, "in one 14

Data concerning the percentage of local workers employed on projects, as well as the wages and benefits paid, likewise are included in these reports.[131] Also reproduced are comments by customers in regard to TIC's performance, and investigative reports similar to those quoted above, concerning the inaccuracy of the union reports and claims.

TIC also has explained how the unions distort its role in litigation. In construction, any lawsuit is likely to include several parties because of the many subcontractors, investors, bonding companies, and other entities involved. The union literature apparently counts each party to a single case as a separate case to claim that TIC is involved in more cases than it is. The TIC reports repeat the union claims, and then reply to them factually.[132]

TIC also moved energetically on the legal front to defend its interests, resulting in the demise of the TAMETIC (LASER) program in late 1994. Because these activities have significant general application, discussion of them is reserved for later.[133]

E. *Transferring District 51 Policies to West Virginia*

The success of District 51's environmental permitting program has led to emulation elsewhere. Campaigns patterned upon District 51's activities have been found in Florida, Georgia, and Texas, in addition to the extensions of the District 51 program to Oregon, and via TAMETIC, to several other States. West Virginia,

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month period, there were 101 injured TIC workers who filed workers compensation claims from . . . [one] job." TIC responded that the data were ten years old, that for 660,000 hours worked on this project, 19 workers compensation claims were filed in 1982 and 80 in 1983, and that 89% of the claims were minor and involved no lost time. TIC then presented its 1991 mine safety records compared with the national average: the incident rate was 6.14 for TIC, 15.1 for the national average; the frequency rate was 2.53 for TIC, 7 for the national average; and the severity rate was 45.95 for TIC, 162.3 for the national average. *See* Letter from John L.C. Black, Vice-President and General Counsel, TIC, to John Fitz-Gerald, General Counsel, Gold Fields Mining Company, at 7 (June 16, 1992) (on file with Dr. Northrup); *see also* TIC, RESPONSE TO THE LASER [TAMETIC] BROCHURE 11 (4th ed.) (containing TIC's 1992 safety record which compared equally favorably with the national average).

131. *See, e.g.*, Letter from Leroy Meador, President, TIC Wyoming, Inc., to U.S. Rep. Byron L. Dorgan (Apr. 24, 1992) (on file with Dr. Northrup). Dorgan was influenced by TAMETIC to question TIC hiring methods. The letter showed that in four previous projects, local workers constituted 66%, 88%, 100%, and 50% of the TIC work force.

132. Copies of the TIC reports responding to those issued by the union are in Dr. Northrup's possession. They are entitled *The TIC Holding Companies' Response to the [Unions'] Brochure.* These reports, as stated in the text, repeat the unions' claims, then provide detailed rebuttals, safety statistics and rates, percentage of local employees working on given projects, wages paid, and so on.

133. *See infra* Parts IV.C.2, IV.G.

however, boasts the most serious attempt to emulate the District 51 program.

The West Virginia union organization through which the regulatory tactics are directed, the Affiliated Construction Trades Foundation ("ACT"), is composed of all the state's AFL-CIO local construction unions that are willing to participate. ACT is headquartered in Charleston, the state capital, and is financed by a 25¢-per-hour wage deduction, which affiliated unions attempt to negotiate with employers. ACT does not as yet have the sophisticated computer database of District 51, although it plans to develop one.[134] The much smaller West Virginia population and economy may make the database unnecessary. Much of ACT's efforts are directed to lobbying at the state and local levels. A public relations firm, Knight-Phillips Associates, and an environmental concern, Carpenter Environmental Associates, are registered state lobbyists for ACT, as are a number of union officials.

Additionally, ACT has applied for tax exempt status under section 501(c)(5) of the Internal Revenue Code.[135] In its application, ACT listed a budget of $689,200 for 1992, of which $628,390 was for "public relations," and $666,300 for 1993, of which $602,570 was for this activity.[136] ACT has a substantial budget considering West Virginia's population of less than two million.

According to Steve White, ACT's director, "the main goal of our program is to get more work for our members and it is fair to judge ACT on how it progresses towards that goal."[137] In reference to Kmart, the discount store chain, and its use of an open shop contractor, the Phillips organization, to build stores, White explained how ACT plans to accomplish its "main goal": "Our goal is to cost Kmart the same amount of money they 'think' they are saving by using Phillips."[138]

ACT's "public relations" involve a variety of activities, including a monthly published paper, *The ACT Report*, statewide television programs, press releases, and lobbying. The standard version of

134. Steve White, ACT's director, declared that "[o]ur first order will be to develop a computerized database that tracks every construction project in the State." ACT REP., Sept.-Oct., 1992, at 3.

135. 26 U.S.C. § 501(c)(5) (1988).

136. The lobby filings and the application for tax-free status of ACT are in the authors' possession.

137. *First Plan, No Act*, ACT REP., Nov. 1992, at 3.

138. *ACT Must Have a Plan to Be Effective*, ACT REPORT, Sept.-Oct., 1992, at 3.

its reports declares without much subtlety that all open shop contractors violate safety rules, are oblivious to environmental concerns, hire few, if any, local workers, provide no training and pay substandard wages and benefits.[139]

Particular targets of ACT include the three major chemical companies in the Charleston area: DuPont, Union Carbide, and Rhone Poulenc. These companies award construction and maintenance contracts on a merit shop basis, and as a result, open shop contractors have won much of this business. Brown & Root is a major contractor for this work and is consistently targeted. An attempt was made to organize Brown & Root employees working at the three chemical companies, but the unions suffered a crushing defeat in an NLRB representation election.[140]

Both in the initial permitting process and by filing court appeals, ACT has delayed permits for the three major chemical companies and other companies. Its greatest success has been in preventing the passage of a bill in the state legislature, labeled by ACT as the "Cancer Creek" bill, which apparently would have provided some relief from environmental regulations for a proposed new paper mill. The postponement of the bill for a one-year study may have killed the project and prevented the badly needed employment in the impoverished State. Given ACT's stated goal, its opposition presumably arose because a nonunion contractor was designated for the work.[141] ACT also claims credit for inducing the legislature to investigate the state's water pollution regulations, which it claims are inadequate.

ACT, however, certainly has not achieved successes similar to those of District 51 in California. West Virginia has a chronically

139. For a factual account of these issues, see OSCR, *supra* note 5, at chs. IX-XII.

140. The vote conducted by mail and announced on July 28, 1994, was 420 for "no union," 120 for the various unions, 287 challenged, and 10 void. Because the votes challenged by either party would not change the results, they were not counted. *See* Case No. 9-RC-19211; *see also* Brown & Root, Inc., Case No. 9-RC-19211, 314 N.L.R.B. No. 4 (June 7, 1994) (the NLRB determined eligibility to vote). In regard to delays in the case, see *Charleston, W.Va., Trades Press for Brown & Root Unit Election*, 40 Construction Lab. Rep. (BNA) 95 (Apr. 6, 1994); *Election Petition Grows Old*, ENGINEERING NEWS REC., Apr. 4, 1994, at 11. At issue was the NLRB policy for construction which permits those who worked only briefly for a company, but who no longer do so and may never be reemployed, to vote. To gain votes, ACT advertised heavily for all those who once worked for Brown & Root in the state to vote in a representation election, but clearly without the results it expected. For a critical analysis of the NLRB policy in determining eligibility to vote in construction industry representation elections, see Northrup, *supra* note 12, at 479.

141. The "Cancer Creek" bill brought ACT publicity for some months. *See, e.g.*, *ACT Fights Pollution Tax Break*, ACT REP., Mar. 1994, at 1; *ACT Wins Cancer Creek Fight, Year-Long "Study" Is Scheduled*, ACT REP., Apr. 1993, at 1.

depressed economy because its once key industry, coal mining, has seriously declined.[142] The decline of coal mining combined with a small, relatively poor population, mitigate against major construction projects in West Virginia. Additionally, the United Steelworkers' ("USW") construction division, formerly District 50 of the United Mine Workers ("UMW"), is strong in West Virginia, and wins many construction jobs, particularly in heavy work and highway work. West Virginia's environmental laws are not nearly as diverse, complicated, or stringent as California's. Thus, the permitting process does not lend itself to the same interminable appeal and delay tactics. Nevertheless, the political climate in the State is favorable to ACT.

The officials of ACT have been very direct in their objectives. Their video, copied in form from District 51's presentation, and *The ACT Report*, their monthly paper, clearly state that every attempt will be made to continue to harass, delay, and otherwise to increase costs and inflict penalties on open shop contractors and their users in an unremitting drive to make construction all union.

IV. Attempts to Counterbalance Union Permitting Pressures

Thus far, attempts of open shop contractors to curb the regulatory activities of District 51 and its allies have had only limited success. This section examines what has occurred on the legal front, as well as approaches which have yet to be tried, but which may have merit.

A. *The Antitrust Approach*

As mentioned earlier, Petrochem Insulation, Inc. was denied the right to bid on a cogeneration job at the Chevron Richmond refinery, and at other facilities, apparently as a result of union environmental activity.[143] Petrochem filed suit against District 51, its constituent unions, and various individuals in federal district court. Petrochem's original complaint alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), as-

142. West Virginia, once the country's leader in coal production, now stands third behind Wyoming and Kentucky. It could decline even farther because of the Clean Air Act's requirements that have reduced the demand for the high-sulphur coal found in West Virginia.

143. *See supra* Part III.C.1.

serting that a conspiracy existed among District 51, its nineteen local union members, its business manager, attorney, and others.[144] The Court dismissed the action, holding that the RICO claims were preempted by the NLRA.[145]

An amended complaint seeking to reconsider the RICO claims and to add antitrust claims, was also found facially inadequate, and leave to amend was denied.[146] A second amended complaint alleged solely antitrust violations. This complaint was ultimately dismissed with prejudice, primarily on the grounds that plaintiff's claims lacked specific allegations of an effect on competition, rather than on Petrochem alone. The Ninth Circuit affirmed the dismissal, and the Supreme Court denied certiorari.[147]

A similar California case, involving BE&K Construction Co. ("*POSCO*"), also has been disposed of recently by the Ninth Circuit.[148] In *POSCO*, the construction unions of Contra Costa County, California, which did not represent the employees of BE&K, opposed construction and environmental permits, lobbied for passage of a hostile environmental ordinance, sued to enforce the ordinance, pressured BE&K's subcontractors to protest alleged safety violations, filed environmental suits against BE&K, and brought numerous grievance proceedings against

144. *See* Petrochem Insulation, Inc. v. Northern Cal. & N. Nev. Pipe Trades Council, 137 L.R.R.M. (BNA) 2194 (N.D. Cal. 1991) (Complaint filed, Dec. 20, 1990).

145. *See id.* As mentioned in the discussion of § 302 of the NLRA, *infra* Part IV.E, RICO is not always found to be preempted by the NLRA in labor cases. *See* O'Rourke v. Crosly, No. 93-1043 (D.N.J. Mar. 28, 1994), Daily Lab. Rep. (BNA) No. 69, at A-6 (Apr. 12, 1994).

146. *See* Petrochem Insulation, Inc. v. Northern Cal. & N. Nev. Pipe Trades Council, 139 L.R.R.M. (BNA) 2956 (N.D. Cal. 1992) (Order, July 30, 1992).

147. *See* Petrochem Insulation, Inc. v. Northern Cal. & N. Nev. Pipe Trades Council, 8 F.3d 29 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1293 (1994). For a careful analysis of why the District 51 permitting activity should be subject to the anti-trust laws, see Durie & Lemley, *supra* note 15. These authors conclude:

> Union activity such as that undertaken by the building-trades unions in northern California poses a threat to competition and is amenable to suit under the antitrust laws. While the union activity does not fit precisely into any traditional antitrust category, it is best characterized as an attempt to monopolize or a group boycott. The labor exemption and *Noerr-Pennington* immunities are hurdles, but neither should prove an insurmountable barrier to a successful challenge to the union litigation strategy.

Id. at 800. On the general, but very limited, application of antitrust legislation to employee relations matters, see EDWARD B. MILLER, ANTITRUST LAWS AND EMPLOYEE RELATIONS (1984).

148. *See* USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800 (9th Cir. 1994). BE&K was one of the several large companies that did not cooperate with *Engineering News Record* for the latest version of the ranking of contractors. BE&K was the twenty-first largest contractor in 1993, with new contracts valued at $1.6 billion. *See The Top 400 Contractors*, ENGINEERING NEWS REC., May 23, 1994, at 41.

BE&K's union partner, Eichleay Construction. BE&K originally sued the unions under 29 U.S.C. § 187, but later amended its complaint to claim antitrust violations. The unions ultimately succeeded in having the action dismissed, although the court expressed a number of important reservations, which are discussed below.

As a general matter, the prospective defendants in all such cases will be labor organizations, and the anticompetitive activity concerns "petitioning" activity arguably protected by the First Amendment. Thus, the major hurdles are the labor exemptions to the antitrust laws and the *Noerr-Pennington* doctrine.[149] Both are significant impediments to relief, but occasionally have been overcome.[150]

1. *The Labor Exemptions*

Labor organizations enjoy immunity from the antitrust laws because of both a statutory and a non-statutory exemption. The statutory exemption[151] shields a union from liability for its anticompetitive actions "[s]o long as a union acts in its self-interest and does not combine with non-labor groups."[152] Thus, a union loses protection when it conspires with employers and suppliers to create a closed market[153] or when it conspires with one set of employers to destroy another.[154] An antitrust plaintiff usually can plead and prove a combination or conspiracy of a type not protected by the labor exemption in cases where the union's objective is to require the non-labor project owner to agree to boycott open shop contractors.

The Ninth Circuit, in its *POSCO* opinion,[155] noted a second requirement of the statutory labor exemption: the union must pursue a "legitimate" goal. Drawing heavily on the seminal law review article by Durie and Lemley,[156] the Ninth Circuit held that

149. *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

150. *See, e.g.*, Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

151. *See* 15 U.S.C. § 17 (1988); 29 U.S.C. § 52 (1988).

152. United States v. Hutcheson, 312 U.S. 219, 232 (1941).

153. *See* Allen Bradley Co. v. Local No. 3, Int'l Brotherhood of Elec. Workers, 325 U.S. 797 (1945).

154. *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965).

155. *See* USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800 (9th Cir. 1994).

156. *See* Durie & Lemley, *supra* note 15.

a union forfeits its statutory exemption, not only when it conspires with a non-labor entity, but also when it does not act in its "legitimate" self interest.[157] "Whether the interest is legitimate depends on whether the ends to be achieved are among the traditional objectives of labor organizations."[158] In particular, the court found the alleged use of frivolous or automatic legal action "troublesome," and possibly not in the unions' legitimate self-interest. It ultimately affirmed the dismissal on *Noerr-Pennington* grounds. However, it placed the burden on the unions to demonstrate the propriety of their "non-traditional" actions for purposes of the statutory labor exemption.[159]

The nonstatutory exemption also may shield a union's anticompetitive actions from antitrust scrutiny. It exists primarily to protect restraints incidental to collective bargaining agreements and other arrangements concerning "legitimate subjects of collective bargaining."[160] Many courts now agree that a restraint normally should meet three criteria before this exemption will apply:[161] (a) the restraint must primarily affect only the parties to the agreement; (b) it must concern a mandatory subject of bargaining; and (c) it must be the product of bona fide arms-length bargaining. These criteria are not bright-line rules, and courts have applied the exemption in unexpected circumstances.[162] Nevertheless, it seems likely that coercion of a hot cargo agreement from a project developer would meet none of these tests. Thus, the nonstatutory exemption will rarely apply to union activities of the type addressed in this Article.

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157. The word "legitimate" does not appear in the original formula announced in United States v. Hutcheson, 312 U.S. 219 (1941). However, the qualifier was introduced in H.A. Artists & Assocs., Inc. v. Actors Equity Ass'n., 451 U.S. 704, 721 (1981), and appears to have become part of the lexicon.

158. *POSCO*, 31 F.3d at 808.

159. *See id.* at 809-11.

160. National Ass'n of Women & Childrens Apparel Salesmen v. FTC, 479 F.2d 139, 144 (5th Cir.), *cert. denied*, 414 U.S. 1004 (1973); *see In re* Detroit Auto Dealers Ass'n, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992); Connell Constr. Co. v. Local 100, 421 U.S. 616 (1975).

161. This test was first formulated in Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). It has been widely adopted by other courts. *See, e.g., In re* Detroit Auto Dealers Ass'n, 955 F.2d 457, 461-63 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992); Powell v. National Football League, 930 F.2d 1293, 1297-99 (8th Cir. 1989); Continental Maritime v. Pacific Coast Metal Trades Dist. Council, 817 F.2d 1391, 1393 (9th Cir. 1987).

162. *See, e.g.*, Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987).

2. Noerr-Pennington *Immunity*

In contrast to the relatively narrow labor exemptions, *Noerr-Pennington* immunity poses a serious obstacle to application of the antitrust laws to cases involving regulatory interference. The *Noerr-Pennington* doctrine, in its simplest form, states that attempts to influence government action are exempt from antitrust scrutiny. In essence, the doctrine applies the First Amendment to antitrust law. To the extent that an antitrust plaintiff must rely on a union's "petitioning activity" before local political bodies or environmental regulatory agencies, its case will founder on *Noerr-Pennington* immunity.[163]

The *Noerr-Pennington* doctrine is subject to a "sham" exception. That is, the doctrine will not apply where the defendant merely uses the government agency procedures to interfere directly with business activity and makes no genuine attempt to influence government action.[164] Attempts to convince courts to apply the sham exception have rarely been successful. Courts hesitate to use this exception for several reasons. First, it is possible that the exception does not exist with regard to purely political appeals.[165] Unions—like any other person—usually invoke the political process in a genuine search for relief. Second, there is rarely a formalized process to invoke or abuse. Third, no one expects a political body to decide questions according to politically neutral criteria. In the typical political forum, neither a petitioner's anticompetitive intent nor the government's desire to favor one competitor over another has any antitrust significance.[166]

When the government body plays an adjudicatory role, the case is somewhat different. The adjudicator must balance the First Amendment rights of petitioners against the legitimate due process rights of other parties to the proceedings. A number of Ninth Circuit cases decided in the early 1980s held that an antitrust plaintiff could circumvent *Noerr-Pennington* immunity merely by showing "some abuse of process" and a pattern of ac-

163. *See, e.g.*, USS-POSCO Indus. v. Contra Costa Bldg. & Constr. Trades Council, 692 F. Supp. 1166 (N.D. Cal. 1988), *aff'd*, 31 F.3d 800 (9th Cir. 1994).

164. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

165. *See* Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1080-81 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

166. *See* City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991); Parker v. Brown, 317 U.S. 341 (1943).

tions prosecuted, not necessarily without merit, but "automatically and without regard to merit."[167]

Subsequent decisions, however, have cut back on at least part of this expansive reading of the sham exception.[168] Most recently, in *Professional Real Estate Investors v. Columbia Pictures*,[169] the Supreme Court has determined that, to demonstrate a "sham," an antitrust plaintiff must demonstrate that the proceeding was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."[170] In addition, the plaintiff must prove subjective intent to use the process, as opposed to the outcome, to achieve an anticompetitive end.[171] This two-step analysis is designed to assimilate *Noerr-Pennington* analysis into the law of malicious prosecution.[172] The plaintiff will rarely be able to make such a showing, particularly in the environmental arena. The air can always be made a little cleaner, the water a little purer. Few actions ostensibly brought to achieve these ends could be described as "objectively baseless," because there is always room for some level of technical and scientific disagreement.

Although it can be argued that the union's primary impact has been through threats to sue or petition, rather than core First Amendment action, the trend has been to extend *Noerr-Pennington* protection to threats and publicity as well as to the underlying protected activity.[173] There is, however, respectable contrary authority.[174] After *Professional Real Estate Investors*, it is unclear how one should evaluate, for example, the objective

167. Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1257, 1259 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *see also* Richards v. Canine Eye Registration Found., 783 F.2d 1329 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986); Energy Conservation v. Heliodyne, 698 F.2d 386 (9th Cir. 1983).

168. *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988); Oregon Natural Resources Council v. Mohla, 944 F.2d 531 (9th Cir. 1991).

169. 113 S. Ct. 1920 (1993).

170. *Id.* at 1928.

171. *See id.*

172. *See id.* at 1929.

173. *See, e.g.*, Coastal States Mktg. v. Hunt, 694 F.2d 1358, 1367-68 (5th Cir. 1983); Aircapital Cablevision v. Starlink Communications Group, 634 F. Supp. 316 (D. Kan. 1986); *cf.* Brown & Root, Inc. v. Louisiana State AFL-CIO, 10 F.3d 316, 323-25 (5th Cir. 1994) (explaining that, although threats to engage in legal activity can be illegal under certain circumstances, courts generally do not apply this principle to union political activity).

174. *See, e.g.*, Alexander v. National Farmers Org., 687 F.2d 1173, 1200-03 (8th Cir. 1981), *cert. denied*, 461 U.S. 937 (1983); Oahu Gas Serv. v. Pacific Resources, 460 F. Supp. 1359 (D. Haw. 1978); Prelin Indus. v. G&G Crafts, 357 F. Supp. 52 (W.D. Okla. 1972). *Alexander*, in particular, does not hold that threats of litigation lack *Noerr-Pennington* protection. However, it gives such actions a distinctly different degree of deference.

baselessness of a threat of unspecified future litigation. It may well be that only subjective intent to abuse process is relevant in evaluating such a threat.[175]

In *POSCO*, the Ninth Circuit has also taken the position that a lesser showing of objective baselessness is required when the plaintiff can prove a pattern of repetitive, automatic litigation. It is not clear how much lighter the burden may be. The *POSCO* court found that *Noerr-Pennington* immunity was established as a matter of law when the union had some degree of success in over 50% of its cases. Given the nature of environmental standards litigation, and the pressure on developers to settle, labor organizations can expect at least some degree of objective success in many cases, even if the underlying claim is entirely frivolous. *POSCO* dealt largely with matters litigated to decision. In the more typical case, the developer is forced to settle prior to any decision on the merits. In such circumstances, there is no merit or lack of merit to assess, objectively or otherwise, and the plaintiff may well be able to use *POSCO* to direct the court's attention to the pattern and purpose of the union's conduct.

3. *Other Obstacles*

In addition to the difficulties inherent in labor and *Noerr-Pennington* antitrust litigation, contractors challenging a union's permitting activities face the usual burdens of pleading and proving an antitrust case: market definition, effect on competition, antitrust standing, and unreasonable restraint. As the *Petrochem* plaintiffs found, these obstacles can be as daunting as the *Noerr-Pennington* problems.

B. *RICO*[176]

RICO actions against labor organizations face at least two special problems in addition to the difficulties inherent in prosecuting any RICO case. The first, and perhaps most significant, concern is preemption by federal labor law. The second is the application of the person-enterprise distinction to labor organizations.

As both a constitutional and a policy matter, state law is broadly preempted by federal labor law. By contrast, the relation-

175. This was precisely the approach taken by the Eighth Circuit in *Alexander*.

176. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941-48 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1984)).

ship among different federal laws lacks this constitutional dimension. Therefore, potential conflicts are analyzed in terms of an accommodation between differing policies. Despite the fact that RICO is a federal statute, it is treated for preemption purposes much the same as if it were state law and is subject to both *Garmon*[177] and section 301[178] preemption.

Garmon preemption applies to matters within the jurisdiction of the NLRB. A law is preempted if the conduct which it regulates is arguably permitted or arguably prohibited by the NLRA.[179] A number of courts have now held that, at least with respect to some types of predicate acts, this type of preemption applies to RICO as well.[180] Specifically, a *Garmon*-type preemption applies at least when the alleged predicate act is "generic." Predicate acts such as mail fraud, wire fraud, and extortion do not themselves define the plaintiff's right to the interest of which he was defrauded. If the source of the invaded right rests in labor law, then RICO is being applied to enforce the labor laws, an outcome which is inconsistent with the primary jurisdiction of the NLRB. Thus, for example, Petrochem's right not to be hampered by hot cargo agreements between the union and the project owners is a right derived from section 8(e) of the NLRA. For this reason, the *Petrochem* court held that the company's RICO action was preempted.[181]

A similar analysis is applied when the right or property interest derives from a collective bargaining agreement.[182] By analogy to section 301 preemption of state law,[183] RICO cannot be used to enforce labor agreements or to vindicate rights that arise solely by virtue of labor agreements, even when the deprivation is carried out by means of fraud or extortion. It is important, however, to mention that labor preemption applies only to "generic" predicate acts. RICO cases against labor organizations have not encountered preemption problems when the RICO "pattern" is

177. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

178. Labor Management Relations Act, Pub. L. No. 80-101, § 301, 61 Stat. 136, 157 (1947) (codified at 29 U.S.C. § 185 (1978)).

179. *See Garmon*; Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 113 S. Ct. 1190 (1993). The latter case is discussed *infra* Part IV.H.

180. *See, e.g.*, Brennan v. Chestnut, 973 F.2d 644 (8th Cir. 1992); Butcher's Union, Local 498 v. SDC Invs., Inc., 631 F. Supp. 1001 (E.D. Cal. 1986).

181. *See* Petrochem Insulation, Inc., v. Northern Cal. & N. Nev. Pipe Trades Council, 139 L.R.R.M. (BNA) 2956 (N.D. Cal. 1992) (Order, July 30, 1992).

182. *See* Underwood v. Venango River Corp., 995 F.2d 677 (7th Cir. 1993); Hubbard v. United Airlines, 927 F.2d 1094 (9th Cir. 1991).

183. *See* Lingle v. Norge Division of Magic Chef, 486 U.S. 399 (1988).

based on violence or threats of violence, or extortion of conventional property rights.[184]

The application of at least some form of labor preemption to RICO seems justified,[185] but the use of person-enterprise analysis is more difficult to accept. RICO prohibits a "person" from conducting the affairs of an "enterprise" through a pattern of criminal activity.[186] A number of courts have held that Congress intended that the "person" who conducts the enterprise must be different from the "enterprise" itself.[187] Building on this fragile foundation,[188] a few courts have held that there is an insufficient distinction between international unions, local unions, and union members to identify distinct persons and enterprises, thus effectively immunizing labor organizations from RICO liability.[189] In contrast to the labor preemption cases, which attempt to harmonize RICO and labor law, this line of cases seems inconsistent with agency principles of labor law that should be applied.[190]

C. *Secondary Boycott and Hot Cargo Litigation*

Three recent cases, with quite divergent results, illustrate the application of NLRA section 303 to the union use of the political and administrative process for economic ends. Section 303[191] creates a private civil damage remedy for union unfair labor

184. *See, e.g.*, New Beckley Mining Corp. v. International Union, United Mine Workers, 946 F.2d 1072 (4th Cir. 1991), *cert. denied*, 503 U.S. 971 (1992); United States v. Carlock, 806 F.2d 535 (5th Cir. 1986), *cert. denied*, 480 U.S. 949 (1987).

185. The argument runs as follows: RICO creates no new federal rights; it simply provides civil remedies for crimes. Thus, when the crime depends on a federal law that is already part of a comprehensive remedial scheme, such as the NLRA, RICO should give way to the specific federal remedial policies embodied in the underlying statutory scheme.

186. *See* 18 U.S.C. § 1962(c) (1984). "Person" and "enterprise" are defined, respectively, at 18 U.S.C. §§ 1961(3) and (4).

187. *See, e.g.*, Lorenz v. CSX Corp., 1 F.3d 1406 (3rd Cir. 1993); Guidry v. Bank of LaPlace, 954 F.2d 278 (5th Cir. 1992).

188. It has been clear at least since United States v. Turkette, 452 U.S. 576 (1981), that wholly criminal organizations may be RICO enterprises. In this case, Congress surely did not intend that the individual participants should have civil liability, but the organization should not.

189. *See* New Beckley Mining Corp. v. International Union, United Mine Workers, 18 F.3d 1161 (4th Cir. 1994); Yellow Bus Lines v. Drivers, Chauffeurs & Helpers, Local Union No. 639, 839 F.2d 782, 789-92 (D.C. Cir. 1988), *vacated on other grounds*, 492 U.S. 914 (1989).

190. *See* 29 U.S.C. § 185(e) (1978).

191. 29 U.S.C. § 187 (1978).

practices under section 8(b)(4) of the NLRA.[192] A labor organization violates section 8(b)(4)(ii) when, inter alia, it uses threats or coercion to force a person to agree to cease doing business with a target employer, or to replace one set of employees with another.

1. *Brown & Root*

Cajun Electric Power Cooperative operates two Louisiana electric generating facilities, both of which are unionized. In 1981, Cajun awarded a maintenance contract to Brown & Root, the open shop construction firm. The defendant unions embarked on a course of conduct directed at reversing Cajun's decision. This consisted of a number of fairly vague statements indicating that the unions would "do what they ha[d] to do," coupled with advocacy of durational residency requirements for contractor employees and other, mainly unconstitutional, measures by the state and local government.[193] Despite some legislative success, they were unable to convince Cajun to terminate its relationship with Brown & Root.

In 1984, a bill was introduced in the Louisiana legislature that would have subjected electrical cooperatives' pricing to state regulation. After exhausting other avenues, Cajun requested help from the unions in fighting the legislation. The AFL-CIO agreed to cooperate with the tacit understanding that Brown & Root's contract would be terminated. The bill was defeated. Although Brown & Root had just won a new contract in a contest against both union and non-union contractors, Cajun canceled the contract and rebid it, permitting only union contractors permitted to bid.

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192. 29 U.S.C. § 158(b)(4)(ii) (1973). This provision makes it an unfair labor practice for a union:

> to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (A) forcing or requiring any employer . . . to enter into [a hot cargo agreement] . . .
>
> (B) forcing or requiring any person . . . to cease doing business with any other person . . .
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . .

193. Brown & Root, Inc. v. Louisiana State AFL-CIO, 10 F.3d 316, 322 (5th Cir. 1991). In a related action, the district court held that one of the ordinances involved was unconstitutional. *See* Holloway v. Pointe Coupee Police Jury, No. 84-736-B (M.D. La. June 6, 1986).

Brown & Root sued the unions under section 303. After a bench trial, the district court found for the unions, holding that there had been no coercion, merely an understanding between the unions and Cajun. The Fifth Circuit agreed, finding that the union activities not only failed to reach the level of coercion, but were also protected by the First Amendment as set forth in the *Noerr-Pennington* doctrine.[194]

It is not clear that Brown & Root could have succeeded on any theory, given the facts of the case. Nevertheless, the Fifth Circuit's analysis is instructive. The court first concluded that the unions' statements were not "coercive" because any threats were too vague. The court suggested that unless the threats were quite specific, they must be "accompanied by economic actions such as strikes or picketing."[195] It is uncertain whether or not the court meant to imply that *only* the use of labor's traditional economic weapons can resolve ambiguous threats. If so, this places a novel and serious limitation on the scope of section 303.

Brown & Root argued that the *threat* to engage in lobbying and other protected activity was coercive and was not itself protected. The court rejected both branches of the argument. It conceded that threats to engage in lawful activity may be unlawful. It suggested, without deciding, however, that only threats to exercise rights under the NLRA were actionable under section 303. It also concluded that antitrust "sham" analysis might be as appropriate for the threat as for the actual lobbying.[196] Finally, the court expressly applied the *Noerr-Pennington* doctrine to the union's actual publicity and lobbying efforts and determined that no sham had been shown.

Cajun is, in several ways, the converse of the RICO and labor antitrust cases. Both compartmentalize labor law. The RICO and antitrust cases do so by refusing to apply nonlabor remedies to labor organizations. *Cajun*, a labor case, refuses to apply labor law to non-traditional actions by unions. This leaves something of a legal vacuum. However, as discussed below, the NLRB has not been so grudging in its application of the NLRA.

194. *See Brown & Root*, 10 F.3d at 324. The facts in the case are found in the court opinion.

195. *Id.* at 322 (quoting Electro-Coal Transfer Corp. v. General Longshore Workers, 591 F.2d 284, 288 (5th Cir. 1979)).

196. Although the court devoted considerable discussion to these points, it actually held that no such threats occurred. *See Brown & Root*, 10 F.3d at 324.

2. *TIC*

As a result of the Amax Gold case, TIC filed a complaint with the NLRB. TIC alleged that TAMETIC had violated NLRA sections 8(b)(4)(A) and (B) by attempting to coerce Amax to boycott TIC and to agree to boycott it in the future.

TIC clearly hoped for a broad order against the union and its campaign. Although it did not obtain blanket relief, it did win the case when the NLRB Regional Director worked out a consent order with the unions. The Regional Director acted after receiving a memorandum from the NLRB Associate General Counsel, Division of Advice, which stated in part:

> In the instant matter, the evidence clearly shows that the filing of the Union's environmental comments was for the illegal objective of interfering with the business relationships between Amax and TIC. In this regard, the Union was willing to forgo filing their comments if Amax would alter that business relationship and therefore, these actions were for an illegal objective under the Act.[197]

The NLRB's Advice Memorandum concluded:

> We conclude that complaint should issue, absent settlement, alleging that TAME and the local unions of which it is the agent, herein collectively the Union, violated Section 8(b)(4)(ii)(A) and Section 8(b)(4)(ii)(B). Thus, we would place before the Board the question of whether the Union unlawfully filed environmental comments with the BLM [U.S. Bureau of Land Management] and the state agency with an object of forcing Amax to enter into an agreement to cease doing business with TIC . . . . We would argue that neither the First Amendment nor potential conflict with environmental laws precludes such a finding, and would seek a narrowly tailored remedy to avoid First Amendment problems and any possible conflict with state and federal environmental laws.[198]

The consent agreement requires District 51 and its affiliated local unions to post a notice, directed to union members and employees of TIC and Amax Gold, that

> WE WILL NOT approve the filing of environmental comments by TAME T.I.C. with governmental agencies where an object thereof is to force Amax to enter into an agreement to cease doing business with TIC at the Amax Gold Hayden Hill Project. WE WILL NOT approve the filing of environmental comments by TAME T.I.C. with governmental agencies where

197. Letter from Allen, *supra* note 119, at 13.
198. *Id.* at 6.

> an object thereof is to force Amax to cease doing business with TIC at the Amax Hayden Hill Project.[199]

This consent order is possibly the first official recognition that union use of the environmental permitting process can be a violation of the NLRA. However, the victory was a relatively narrow one. The Board's order specifically applies only to the Amax Gold project, where TAMETIC made no attempt to disguise that it was threatening to delay a permit in order to displace TIC and demanding that Amax agree never to contract with TIC again. Further, the order did not apply to the national UA, which TIC very much wanted to cover in its charge. Finally, the order of an administrative agency cannot be enforced by contempt proceedings. Instead, violations are determined through an administrative hearing.

Possibly in an attempt to build on its result before the NLRB, TIC also sued for damages in federal district court under section 303.[200] The suit encompassed the UA, the Western Federation, District 51, and twenty-two local unions of the UA, as well as TAMETIC (now LASER). The complaint alleged that TAMETIC was an agent of these organizations, as stated in the NLRB advice memorandum. It recited the facts of the Denver Airport case, the Amax case, and the relevant activities of James Wilson, which it charged were coercive activities intended to obtain hot cargo agreements.

The case remained inactive until after the NLRB advice memorandum became public in early 1994. At that time, the court convened the parties to establish a schedule and provided for discovery. Obviously concerned about the reach of the case, the union defendants opted for a four-point settlement that effectively released TIC from LASER's efforts. It provided that:

(a) LASER cease all environmental permit activities pertaining to TIC for two years;

(b) LASER withdraw all objections to environmental permits where parties agreed not to institute legal action against LASER;

(c) LASER cease all other actions against TIC for one year including the gathering of information regarding TIC; and

199. *NOTICE TO ALL EMPLOYEES AND MEMBERS* . . . . included as part of settlement agreement in Case No. 27-CC-26.

200. *See* TIC—The Industrial Company v. TAME T.I.C., No. 92-N-781 (D. Colo. 1995) (Amended Complaint, July 10, 1992).

(d) Laser destroy all of its materials pertaining to TIC.[201]

Even though some of the terms of the settlement have time limits, it seems unlikely that LASER could revive its anti-TIC activities at a later date. LASER is not, however, completely dead. Local pipefitter unions may use Wilson's services as a substitute for District 51 under the name of LASER.

3. *BE&K*

Another recent and similar case involved the large open shop contractor, BE&K.[202] In April, 1994, a federal court jury in Arkansas awarded BE&K more than $20 million in damages from the Carpenters' union and the United Paperworkers International Union ("UPIU").[203] The jury apparently agreed that the unions had threatened the project owner with violence and unlawful picketing unless BE&K was terminated as the contractor for the large project. BE&K sued under section 303 and under state tort law. Virtually all of the damages were awarded as punitive damages for tortious interference with business relations.

BE&K demonstrated that the Carpenters' union had been waging a "corporate campaign"[204] against BE&K and that the UPIU, which represents employees in most paper mills, had been assisting the campaign. BE&K relied heavily on evidence of this campaign and of serious incidents of violence which had been directed at BE&K on another project. These served as the background which resolved any ambiguity in the statements made by

201. *See id.* (Settlement Agreement, 1995). A stipulation in the settlement provides that actions may be commenced within the two-year period in any joint venture of TIC which involves four other open shop contractors: Brown & Root, CD&K, Corey Delta, and Timec. TIC agreed to this, apparently because it has no plans for such joint ventures.

202. For information regarding BE&K, see *supra* note 148.

203. *See* BE&K Constr. Co. v. United Brotherhood of Carpenters, No. PB-C-92-222, Daily Lab. Rep. (BNA) No. 73, at AA-1 (E.D. Ark. Apr. 14, 1994).

204. For a description of "corporate campaigns," see Northrup, *supra* note 114. The Carpenters' union campaign against BE&K has been widely publicized, and accounts thereof appear regularly in *Carpenter*, the union's monthly journal, and elsewhere. *See, e.g., BE&K Chairman Asks End to UBC [Carpenter] Trades Campaign*, CARPENTER, Jan.-Feb. 1991, at 5; *BE&K Pays for Discrimination Against Union Workers*, CARPENTER, June-July 1993, at 6; *Brotherhood's BE&K Campaign Moves Nationwide*, CARPENTER, Mar. 1988, at 9; Gary Jackson, *Unions Take Battle with BE&K to Texas*, DALLAS MORNING NEWS, Sept. 5, 1989, at 1D; *Unions, BE&K, Square Off*, ENGINEERING NEWS REC., Apr. 13, 1989, at 11.

The UPIU cooperated with the Carpenters because BE&K supplied a temporary maintenance force during strikes and a lockout at International Paper plants in 1987-88. Also a loan of $1 million to the UPIU by the Carpenters, since paid off, helped the UPIU finance the strikes. In 1993, the UPIU and International Paper agreed to end all hostilities, and the UPIU ceased its role in the corporate campaign. This information is from Dr. Northrup's interviews and documents obtained for study of the paper industry strikes.

union officials to BE&K's Arkansas client. As the verdict indicates, BE&K's legal strategy was highly successful.

4. *Reconciling the Results*

The Brown & Root and TIC cases are clearly distinct on their facts. In TIC, the union actively created or threatened to create the problem and actively sought out the project owner to propose the unlawful "solution." In the Brown & Root matter, the threat of union action (or inaction) was largely passive. It was inherent in the union's political potential in a situation created by outside forces. The *Brown & Root* decision is thus perhaps best read as advising caution in applying a labor remedy when the union is largely passive.

On its facts, the BE&K case falls between those of Brown & Root and TIC. Here, the unions' threats and threatening conduct were obvious but not directly actionable, either because they lay in the past or were part of a union corporate and publicity campaign presumably protected by the First Amendment. Although regulatory action by the unions was not at issue, the case may be significant in teaching that such actions can be used as evidence of motive, and to resolve ambiguities in later union statements.

The First Amendment question has yet to be fully addressed in the TIC case. Despite the difference in the clarity of the threat in TIC, the same First Amendment concern is present. Nevertheless, the result may be quite different. The relationship between the First Amendment and the secondary boycott provisions of the NLRA ultimately is a balancing test.[205] The expression of views on public issues is a weighty matter; however, a threat to express technical environmental concerns to obtain an unlawful agreement is entitled to a lower level of constitutional deference.[206]

The Fifth Circuit is correct in demanding proof of a clear and unambiguous threat. No lesser requirement could properly protect the union's right of free speech. When, however, such a demonstration is made, the court should not hesitate to apply federal labor law. The NLRA embodies a sufficiently substantial

205. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982); NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 617-18 (1980) (Blackmun, J., concurring).

206. *See* Electrical Workers v. NLRB, 341 U.S. 694, 705 (1951).

national policy to warrant at least some incidental restriction of speech—for example, employer threats to close a plant in the event of unionization.[207] Indeed, it is precisely the importance of this policy that underlies labor "preemption" of other federal remedies. If federal labor policy is weighty enough to bar the courthouse door to contractors, it should also be sufficient to keep labor organizations from threatening litigious reprisals.

D. *Jurisdictional Disputes*

Jurisdictional disputes over which group of workers will perform a task are an almost inevitable consequence of unionization along craft lines. In the construction industry, a contractor may be struck because of a conflict between two unions even though the contractor may be indifferent to questions of craft or union jurisdiction. The jurisdictional dispute is similar to the secondary boycott in that two disputants, the two unions, may enmesh a "neutral" employer in a controversy that the employer cannot resolve.

Because of the historic frequency of jurisdictional strikes, especially in the construction industry,[208] section 8(b)(4)(D) of the NLRA[209] declares that it is an unfair labor practice for a labor organization to coerce an employer into assigning work to employees in a particular labor organization or a particular trade, craft, or class rather than to employees in another labor organization, craft, or class. When this provision is violated, the NLRB must determine which group is entitled to the work. The Board must give the case an expedited hearing,[210] and it can seek an

207. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). *Gissel* in fact carefully distinguishes between communication of an actual decision to close a plant in the event of a union victory, and a threat to do so. The former is protected speech. The latter is not a representation of existing fact. It is a threat made for the purpose of depriving employees of their rights under the NLRA. *Cf.* Wiljef Transp. Inc. v. NLRB, 946 F.2d 1308 (7th Cir. 1991) (holding that an employer threat to close a plant if unionization occurred was impermissible absent objective evidence that the employer, in fact, would close the plant). The analogy to threats of administrative delay is rather close.

208. Prior to 1981, jurisdictional issues in the construction industry caused at least one-third of all construction strikes. Since then, a combination of work shortages and open shop competition has diminished jurisdictional and all other strikes in this industry, as well as in industry generally. *See* OSCR, *supra* note 5, at 16, 47, 397-99, 608; U.S. Bureau of Labor Statistics strike data.

209. 29 U.S.C. § 158(b)(4)(D) (1973).

210. Section 10(k) of the NLRA (codified at 29 U.S.C. § 160(k) (1973)), directs the Board to "hear and determine" such cases within ten days after a charge is filed. Originally, the NLRB "religiously refrained from making determinations of work assignments in jurisdictional disputes coming before it." HERBERT R. NORTHRUP, COMPULSORY ARBITRATION AND GOVERNMENTAL INTERVENTION IN LABOR DISPUTES 87 (1966). The Supreme

injunction to halt violations if necessary.[211] Even absent action by the NLRB, an employer may seek damages in federal court under section 303.

Section 8(b)(4)(D) was aimed primarily at craft jurisdictional disputes between unions, but it is equally applicable to attempts to replace open shop employees with union workers.[212] There can be little doubt that the replacement of non-union workers is precisely what the unions are attempting to achieve. Because this prohibition avoids the frequently confusing primary-secondary distinctions of secondary boycott litigation, and since it goes to the heart of unions' objective, it may deserve an important place in any analysis of union regulatory action.

E. *Labor Management Relations Act, Section 302*

This provision prohibits payments of money or other things of value by any person to a labor organization, as well as the solicitation of any such payment. Such payment or solicitation is a felony or subject to injunction in a civil action, unless it falls within certain enumerated exceptions. Section 302(c), for example, permits payments for medical or pension benefits, provided that the payment is made to a trust fund. The trust must meet various requirements, notably joint administration by an equal number of union and employer representatives.[213] The fund must be audited annually and be held in trust solely for the benefit of its beneficiaries, in accordance with a written agreement. Payroll deductions are permitted for trust funds or union dues, but section 302 requires written employee authorization.[214]

Union contractors forward funds to District 51 and ACT in one of two ways: either through local union affiliates under collective

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Court, however, found that the NLRB must make awards in such cases. *See* NLRB v. Radio & Television Broadcast Eng'rs Union, Local 1212, 364 U.S. 573 (1961).

211. NLRA § 10(*l*) (codified at 29 U.S.C. § 160(*l*) (1973)) provides for "priority" for such cases. If investigation shows "reasonable cause" to believe that a violation has occurred, the NLRB shall request injunctive relief from the federal district court in the district where the alleged violation has occurred.

212. *See* Harnischfeger Corp. v. Sheet Metal Workers, 436 F.2d 351 (6th Cir. 1970); Vincent v. Steamfitters, Local 395, 288 F.2d 276 (2d Cir. 1961).

213. Public Law No. 91-86, 83 Stat. 133 (1969) (codified at 29 U.S.C. § 186(c)(7) (1978)), added employee scholarship and child care centers to the list of permissible fringe benefits that could be provided legally under the § 302 restrictions, but excepted such benefits from required bargaining status. Public Law No. 93-95, 87 Stat. 314-15 (1973) (codified at 29 U.S.C. § 186(c)(8)), added legal services to the permissible list, with limitations on the use of such services.

214. *See* Labor Management Relations Act, Pub. L. No. 80-101, § 302(2)(c)(4), 61 Stat. 136, 157-58 (1947) (codified at 29 U.S.C. § 186(c)(4)).

bargaining agreements[215] calling for contributions on a employee-hour basis, or through a checkoff deducted from employee paychecks. Neither District 51 nor ACT appears to hold the monies in a trust that complies with section 302(c). If union employers are directly paying the union to run an organization to drive their open shop competitors out of business, the union has not complied with the minimum structural requirements of section 302.

If the payments are made by union employees as "dues," the analysis may be different. A wage checkoff is permitted for union dues, but a union cannot achieve compliance with section 302 just by recharacterizing a payment as dues.[216] The District 51 and ACT programs appear to be more in the nature of an industry promotion fund. It is unclear whether an industry promotion fund in any factual situation can comply with section 302; but, if it can, it must comply with the structural requirements of sections 302(c)(5) or (8).[217]

Federal courts may enjoin payments to labor organizations if they violate section 302.[218] An attempt by an open shop contractor to enjoin the check-off of "dues" paid by the employees of *another* contractor does, however, entail some significant standing problems. A more productive approach may be to take advantage of the fact that section 302 violations are also RICO "predicate acts."[219] Civil RICO actions are not without their own difficulties, but because section 302 is an enumerated predicate act, a RICO action in this context will not be preempted by labor laws.

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215. It is believed that local unions were forwarding funds to the Western District of the UA to support LASER [TAMETIC], but the details of this financing probably will not be revealed because of the settlement of the case, *see supra* Part IV.C.2.

216. *See* Master Insulators v. International Ass'n of Heat & Frost Insulators, Local No. 1, 925 F.2d 1118 (8th Cir. 1991); *see also* Building & Constr. Trades Dep't v. Reich, 815 F. Supp. 484 (D.D.C. 1993) (affirming the Secretary of Labor's determination that "dues" do not extend to job creation schemes under the Davis-Bacon Act). *But see* Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund, 700 F.2d 1269 (9th Cir.), *cert. denied*, 464 U.S. 825 (1983). In that case, however, the funds were used to hire union organizers, a purpose far more closely linked to collective bargaining than are the purposes of the District 51 and ACT programs.

217. *See* Bricklayers, Local 3 v. Masonry & Tile Contractors Ass'n, 136 L.R.R.M. (BNA) 2319 (D. Nev. 1990).

218. *See* Local 144 Nursing Home Pension Fund v. Demisay, 113 S. Ct. 2252 (1993) (holding that courts may enjoin employer payments to employee representatives, but do not have authority to enjoin trust fund and its employees).

219. 18 U.S.C. § 1961(1)(C) (1984).

F. *Abuse of Process*

Food Lion, Inc. is a nonunion, southern supermarket chain against which the United Food and Commercial Workers ("UFCW") has been conducting a "comprehensive corporate campaign"[220] The apparent union goal is to damage the company in order to protect the market share of unionized supermarkets. One aspect of such campaigns is to find and report violations of federal labor laws, thereby causing financial damage through loss of sales and public relations. The UFCW has been quite successful against Food Lion, especially concerning violations of the Fair Labor Standards Act ("FLSA")[221] and its regulations concerning overtime and child (teenage) labor.[222]

Food Lion has claimed that the UFCW exploited the discovery process in certain collateral litigation[223] to gain irrelevant information about Food Lion's policies and structure. According to Food Lion, the UFCW has used this information to file additional charges, disrupt management, generate bad publicity, and aid in UFCW's organizational efforts.

In February 1993, Food Lion sued the UFCW in South Carolina state court, claiming that the UFCW's collateral use of this litigation constituted an abuse of process. The complaint included allegations that the UFCW was bringing its litigation for an organizational purpose.[224] The union had the case removed to federal district court and moved to dismiss. The court found, in light of the alleged organizational purpose, that the union's actions arguably were prohibited by the NLRA. Accordingly, the company's claim was preempted and dismissed.[225] Counsel for Food Lion then amended its complaint, eliminating any reference to an organizational purpose and contending that the UFCW was engaged simply in a scheme to damage the company. The court thereupon vacated its prior dismissal, and restored the case to the docket, where it is now pending. Most recently, the court has ruled that Food Lion's complaint, as amended, does

220. A description of these tactics is found in Northrup, *supra* note 114.

221. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. §§ 201-219 (1978)).

222. For details, see Northrup, *supra* note 114, at 534.

223. *See* Bryant v. Food Lion, No. 2-90-0505-1 (D.S.C. filed 1990).

224. *See* Complaint at 2, Food Lion v. United Food & Commercial Workers, No. 93-CP-23 (S.C. Ct. of C.P., County of Greenville Feb. 12, 1993).

225. *See* Food Lion v. United Food & Commercial Workers Int'l Union, No. 6:93-0582-IAJ, 1993 U.S. Dist. LEXIS 14669 (D.S.C. July 21, 1993) (Order, July 21, 1993).

state a claim for abuse of process under South Carolina law, and it appears that Food Lion will have an opportunity to try the case on the merits.[226]

The campaign conducted by the UFCW against Food Lion has certain similarities to the District 51 program. Both District 51 and the UFCW sponsor legal process either to damage or to organize target open shop firms. This raises the possibility that an abuse of process theory could be applied to a broader range of union activities.

In South Carolina, as in many other jurisdictions, the state supreme court has adopted the views of Prosser and defined the tort of abuse of process as follows:

> [F]irst, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.[227]

Abuse of process bears some generic resemblance to the tort of malicious prosecution. However, abuse of process does not require proof of lack of probable cause or termination in favor of the former defendant. Properly understood, abuse of process does not relate to the merits of the underlying action at all, but instead focuses on the extortionate use of litigation to gain a collateral advantage in some unrelated dispute.

Thus, abuse of process would appear to be an ideal vehicle for challenging the use of litigation over environmental permitting to gain a collateral advantage in the unrelated economic warfare between unions and open shop contractors. Unfortunately, for

226. *See id.* (Order, June 24, 1994).

227. PROSSER & KEETON, THE LAW OF TORTS § 121, at 898 (5th ed. 1984); *see* Huggins v. Winn-Dixie Greenville, 153 S.E.2d 693, 694 (S.C. 1967); *see also* Stoner v. Nash Finch, Inc., 446 N.W.2d 747, 751 (N.D. 1989) (invoking PROSSER & KEETON, *supra*).

largely historical reasons, the tort may be restricted to cases much closer to the Food Lion model.

The tort seems to have been developed in English common law to remedy abusive seizure of goods or arrest of persons in actions for debt. Some jurisdictions still require arrest or seizure as elements of the tort.[228] In an era of probable cause and relatively stringent due process, this is a remedy of rather limited utility. However, the traditional tort is still the action of choice in certain cases, notably when a creditor attempts to use criminal process to extort payment of a debt.[229]

In the free expansion of tort remedies that flourished around mid-century, abuse of process began to lose many of its restrictions. The views of Prosser and the Restatement,[230] which are widely cited, omit any reference to arrest or seizure. Furthermore, the concept of "process" was cast off from its anchorage in the traditional compulsory writs and set off to include "the entire range of procedures incident to the litigation process."[231] Predictably, in this environment, litigants began to plead abuse of process to circumvent the limitations of malicious prosecution and to seek relief in cases in which the only advantage sought was in the underlying litigation. Abuse of process was also plead in cases in which collateral action was wholly proper.[232]

Judicial reaction was not long in coming. Unfortunately for open shop contractors, one leading case came from the Supreme Court of California in a matter involving the alleged misuse of the CEQA.[233] In *Oren*, the plaintiff developer attempted to obtain permits under the CEQA to develop a residential community in Encino. Stanman, a client of the defendant law firm, objected, and the project was substantially delayed. Meanwhile, Stanman and the law firm allegedly attempted to extort money and property from the developer as the price of dropping their environ-

228. *See* Sheridan v. Fox, 531 F. Supp. 151 (E.D. Pa. 1982).

229. *See, e.g.*, Stoner v. Nash Finch, Inc., 446 N.W.2d 747 (N.D. 1989); Voytko v. Ramada Inn, 445 F. Supp. 315 (D.N.J. 1978).

230. RESTATEMENT (SECOND) OF TORTS § 682 (1977).

231. Nienstedt v. Wetzel, 651 P.2d 876, 880 (Ariz. 1982) (citing numerous authorities).

232. *See, e.g.*, Wilcon v. Travellers Indemnity Co., 654 F.2d 976 (5th Cir. 1981) (pleading abuse of process when the collateral action was a proper and intended use of Mississippi attachment statute); Stromberg v. Costello, 456 F. Supp. 848 (D. Mass. 1978) (pleading abuse of process when there were criminal proceedings in a debt case, but no attempt to coerce payment); Amco Ins. Co. v. Stammer, 411 N.W.2d 709 (Iowa Ct. App. 1987) (attempting to circumvent malicious prosecution elements).

233. *See* Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, 728 P.2d 1202 (Cal. 1986).

mental objections. The developer then filed an action grounded in abuse of process.

The Supreme Court of California ultimately held that "the mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action."[234] Apparently, "mere" filing included express attempts to extort money and property.

The *Oren* court discussed three primary concerns with this use of the tort, each of which has been developed in later California cases. First, the court decided the case on the ground that the careful restrictions on the tort of malicious prosecution were being eroded. This development, the court feared, would have a chilling effect on meritorious litigation. Thus, as a matter of constitutional law, the tort must be restricted to protect the First Amendment right to petition.[235]

Second, and perhaps inconsistently, expansion of the tort would multiply litigation, allowing victorious, or even defeated, defendants to prolong litigation indefinitely.[236] Third, the court preserved the First Amendment privilege of litigants to express themselves. Because most extortionate acts in litigation occur in the context of settlement negotiations, application of abuse of process to such cases would constrict settlement discussions and arguably infringe on this privilege.[237]

Although few States would go as far as California in emasculating the tort, these cases illustrate that abuse of process cannot be used routinely. Arguably, all of the California cases could have been decided on a much narrower ground, that is, that the advantage sought by the tort defendant was not sufficiently unrelated to the purposes of the original action. However, even in jurisdictions in which this issue is in proper focus, the results may be unsatisfactory. As Food Lion discovered, in the attempt to

234. *Id.* at 1209.

235. *See* Pacific Gas & Elec. Co. v. Bear Stearns & Co., 791 P.2d 587, 594-98 (Cal. 1990).

236. *See* Bidna v. Rosen, 19 Cal.App.4th 27 (1993). The court refused relief to the plaintiff under any theory despite facts which were "egregious indeed." The case involved six repetitive child custody actions allegedly filed to "extort" a voluntary waiver of custody at a cost to the plaintiff of over $200,000. While reasonable minds may differ about the fine points of the tort, it is difficult even to imagine how the court could feel it was acting in the best interests of the child.

237. In fact, *Oren* held that settlement discussions could be used to show improper purpose. However, later decisions have applied an absolute privilege to settlement offers. *See* Abraham v. Lancaster Community Hosp., 217 Cal.App.3d 796 (1990).

plead a sufficiently "unrelated" advantage, it is easy to stray into areas preempted by the NLRA.

Thus, the open shop contractor attempting to plead abuse of process walks a thin line. If the collateral and improper purpose alleged is too close to the underlying action, no claim is stated, or the claim fails under one of the constitutional or governance issues raised by the California decisions. On the other hand, if the claim raises issues of broad union purpose too far from the merits of the underlying claim, the claim will be preempted. It may be that abuse of process is available only in those cases, like Food Lion, which can be articulated in terms of particularized abuses stemming from well-defined collateral litigation.

G. *TIC's Trademark Infringement Action*

TIC, concerned about the TAMETIC program, has also acted, quite literally to protect its good name. Because "TAME TIC" and "TAMETIC" are phrases that are easy to remember and designate the company in a particular manner, the company benefits if the unions cannot use these terms. In a Colorado state court case, the company forced the unions to abandon the use of them, or any similar name, by suing on grounds of trade mark infringement. To avoid an injunction granting this request, the unions agreed to a consent decree to cease doing so.[238] The anti-TIC campaign is now know as "Legal and Safety Employer Research" ("LASER"), which seems to be less striking nomenclature.

H. *42 U.S.C. § 1983 and* Machinists *Preemption*

All of the approaches discussed thus far rely on a direct confrontation with labor organizations. As a result, they tend to collide with two common obstacles: labor preemption and labor's constitutional rights. One new and very promising tactic not only avoids these barriers, but actually makes affirmative use of the recent convergence of labor preemption and constitutional tort law.

Until the mid-1970s, the sum total of labor preemption analysis was found in *San Diego Building Trades Council v. Garmon.*[239] The *Garmon* rule is that state law is preempted to the extent that

238. *See* TIC Holdings, Inc. v. TAME TIC, No. 92-CV-7514 (Colo. D. Ct., City and County of Denver Jan. 28, 1993).

239. 359 U.S. 236 (1959).

it attempts to regulate conduct actually or arguably protected or prohibited by the NLRA. Certain matters, which strongly and historically affect local interests are excepted from the *Garmon* rule of preemption—violence, for example. This rule is easier to state than to apply, but the objective is clear enough. *Garmon* preemption preserves the jurisdiction of the NLRB against state encroachment. Thus, when the NLRB declined to act, often because economic self-help measures were not regulated by the NLRA, the States were free to regulate.[240]

This was clearly an unsatisfactory state of affairs. Congress had not simply forgotten to regulate self-help; it affirmatively wanted the parties to be free to resort to such measures. To restore the intended balance, a new preemption doctrine was required. This new teaching was announced by the Supreme Court in 1976 in *Machinists v. Wisconsin Employment Relations Commission.*[241] *Machinists* preemption, as it is now commonly known, prohibits local regulation of a broad area left to the free play of economic forces.[242]

Preemption doctrine stood on *Garmon* and *Machinists* for a decade, while the labor community absorbed the implications of *Machinists* preemption. Then, in 1986, the Court announced two important lemmas to the *Machinists* theorem: *Wisconsin Department of Industry v. Gould, Inc.*[243] and *Golden State Transit Corp. v. City of Los Angeles* (*Golden State I*).[244] In *Gould,* the State of Wisconsin had chosen to bar repeat violators of the NLRA from contracting with the State. The Court held that the State was effectively attempting to enforce the NLRA. Although the State was acting in the guise of a market participant, its objective was clearly regulatory and thus prohibited. In *Golden State I,* the City of Los Angeles conditioned the renewal of a taxi franchise on the company's settlement of a labor dispute with the Teamsters. The Court held that the City had impermissibly interfered with the company's right to resort to economic self-help. Indeed, a few years later in *Golden State II,* the Court found that the company's

240. *See* Automobile Workers v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949), *overruled by* Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

241. 427 U.S. 132 (1976).

242. *See id.* at 140.

243. 475 U.S. 282 (1986).

244. 475 U.S. 608 (1986).

rights under the NLRA were enforceable under federal civil rights laws.[245]

Since *Golden State II*, the Court has retreated slightly, holding that a State acting as a true market participant, without an overriding regulatory design, has the freedom to prefer or reject union labor.[246] Some courts have given this "proprietary" qualification a broad interpretation,[247] arguably infringing on *Gould*. Nevertheless, courts are instructed to look to the "totality of the circumstances" to determine whether an action is truly proprietary. As the City of Oakland recently discovered, even the "proprietary" act of canceling a newspaper subscription may violate an employer's civil rights if the evidence of intent to interfere in a labor dispute is sufficiently egregious.[248]

When there is no arguable proprietary interest, any significant interference in a labor dispute will result in a civil rights violation.[249] But even when the State is clearly acting as a market participant and there is no proof of a regulatory motive, the State may yet trample on its own competitive bidding laws in giving preference to labor or management.[250]

In its purest form, union use of the environmental permitting procedure is immune from attack under section 1983. The State is simply a helpless bystander, a neutral vendor of process which is either due or abused, depending on one's point of view. However, the matter is rarely this simple. More often than not, the union approach is to attack the use of non-union labor directly,

245. *See* Golden State Transit Corp. v. City of L.A., 493 U.S. 103 (1989). 42 U.S.C. § 1983 is most frequently invoked by prisoners and arrestees, or by government employees, claiming violation of constitutional liberty, property, or due process rights incident to custodial or employment abuses. However, this extremely general federal civil rights statute also protects against state deprivation of any suitable legal right under federal or even state law.

246. *See* Building & Construction Trades Council of the Metro. Dist. v. Associated Builders & Constructors of Mass./R.I., Inc., 113 S. Ct. 1190 (1993).

247. *See, e.g.*, Bobbler Bros., Inc. v. Roberts, 995 F.2d 911 (9th Cir. 1993); Hotel Employees Union, Local 2 v. Marriott Corp., Case No. C-89-2707 MHP, 1993 U.S. Dist. LEXIS 12229 (N.D. Cal. Aug. 23, 1993). *Bobbler Bros.* may not survive the Supreme Court's yet more recent decision in Livadas v. Bradshaw, 114 S. Ct. 2068 (1994).

248. *See* Alameda Newspapers v. City of Oakland, Case No. C-93-3500-CAL, 1994 U.S. Dist. LEXIS 5960 (N.D. Cal. Apr. 29, 1994). This action recently was settled. The City has agreed to pay the newspaper's legal fees and, apparently, to discontinue its actions in support of the unions. *See City to Pay Attorney Fees to Oakland Tribune*, Daily Lab. Rep. (BNA), No. 152, at A-22 (Aug. 10, 1994).

249. *See, e.g.*, Cannon v. Edgar, 825 F. Supp. 1349 (N.D. Ill. 1993).

250. *See, e.g.*, George Harms Constr. Co. v. New Jersey Turnpike Auth., No. A-113/114-93 (N.J. 1994). *But see* New York State Chapter, Associated Gen. Contractors v. New York State Thruway Auth., 207 A.D.2d 26 (N.Y. App. Div. 1994).

or as a source of alleged environmental impact, while extolling the virtues of union labor. This is frequently the case where the decision-maker is a political or elected body such as a county board of supervisors.

On some occasions, an appeal is made to local, and even racial, prejudices. For example, in one case, the union warned of the sanitary and fiscal effects of introducing poor, uneducated and unskilled workers from outside the local area into a California municipality and its school system.[251] The implication that the contractor was using undocumented Hispanic immigrants was inescapable.

When the decision-making body responds to such tactics, the contractor has a substantial opportunity to obtain relief under section 1983. The government entity may conceal its motivation behind plausible rationalizations for its action. However, under section 1983, the court is not required to accept these justifications at face value. Further, a political body which finds it advantageous to side with labor (or management for that matter) will frequently wish to be *perceived* as taking sides in order to reap the maximum political gain. Thus, frank expressions of support for labor are not uncommon.[252]

This approach clearly will not work in many cases. However, unlike other strategies arguably applicable to union use of the regulatory process, actions under section 1983 have been endorsed by the Supreme Court. Their scope is fairly narrow, but their theoretical foundations are completely solid.

V. Conclusions

A number of factors make the environmental permitting process a potent weapon in the hands of parties with an interest in obtaining concessions from developers and project owners: the sheer number of state and federal laws, the multiple forums, the imprecision of standards, and the conflicting pressures upon legislators, administrators, and regulators. Environmental legisla-

251. *See* Letter from Chris R. Redburn, Adams & Broadwell, to John von Reis, Major Energy Project Planner, San Luis Obispo County Planning and Building Department, at 5 (Sept. 28, 1990) (on file with Dr. Northrup). This thirteen-page, single-spaced letter was an attempt to prevent Brown & Root from receiving the general contract for one of the major Unocal projects. This attempt by District 51's attorneys was unsuccessful. *See supra* notes 92-97 and accompanying text.

252. *See, e.g., Alameda Newspapers*, Case No. C-93-3500-CAL, 1994 U.S. Dist. LEXIS 5960 (N.D. Cal. Apr. 29, 1994).

tion typically is phrased in terms of the attainment of absolutes. Because the laws of thermodynamics guarantee that no industrial activity can be perfectly clean, no project exists that is above some degree of environmental criticism.

Certain labor organizations apparently have used this potential to attain objectives that are not countenanced by federal labor law. The economic effects on contractors and developers are serious and unacceptable as a matter of labor policy. In mitigation, it may be said that the unions and their goals are relatively benign in the larger scheme of things. Unions are permanent organizations whose members must still live in the communities they affect. They are dedicated to permanent economic dominance in a market and therefore have at least some interest in the local economy. Further, their attention is diffuse. They cannot expend all of their resources in one place.

The difficulty is that the technique that the unions have developed may be used in an overtly malignant way by interests who are subject to no such mitigating considerations: competitors, both domestic and foreign, politically motivated groups of every stripe, corrupt labor officials, and private extortionists. None of these entities enjoy labor immunity. However, all have First Amendment rights, which seem to be the more important obstacle to fashioning an appropriate remedy.

There are some constraints. The person or organization setting out to engage in this peculiar form of regulatory blackmail must have access to information sufficient to locate suitable time-sensitive projects, such as the cogeneration and clean fuels projects discussed above. The local regulatory environment must also be suitable, and the aspiring extortionist must be sufficiently well-heeled to secure the appropriate legal and technical weapons. Finally, it apparently helps to have at least a small degree of local political support. Unfortunately, these are qualifications possessed by almost any substantial organization, licit or illicit, and not a few individual entrepreneurs.

The problem requires some solution, or at least a conceptual framework that permits one to imagine a solution; the proper frame of reference has eluded the litigants thus far. The broad approaches—RICO, antitrust, section 303—have all been tried and generally have failed or have bogged down in technical or constitutional concerns. This is not to say that such approaches

cannot succeed, merely that the appropriate application of existing law will not be straightforward.

What does seem to work is a variation on the problem itself: small claims based on discrete aberrations in the union's application of the basic formula. These might include, for example, TIC's trademark action and Food Lion's narrow abuse of process action. Somewhat broader approaches have succeeded in certain circumstances: BE&K's tort action and Alameda Newspapers's use of 42 U.S.C. § 1983.[253]

The lesson seems to be that sandpaper is a more effective tool than dynamite. Courts are understandably reluctant to blast away the unions' regulatory obstructions. However appealing the theoretical basis, the potential for unpredictable damage to both labor law and the regulatory process is serious. For, just as the tactic pioneered by the unions lends itself to wholesale corruption of the democratic process, a broadly-phrased victory by contractors might be used to suppress legitimate group activity and free speech. Courts respond better and more accurately to an incremental approach. By grinding down the weak points in successive cases, the essential legal framework ultimately will emerge. In the process, many of the more flagrant abuses, like those of District 51, its successors, and its imitators, may collapse of their own weight.

Ultimately, part of the solution may also involve a change in the way we conduct regulatory business in general and environmental business in particular. Environmental law, with its uncompromising goals and unlimited standing, has created a new legal industry. The Superfund program, for example, has been supported by billions of dollars in appropriations, but accomplished relatively few cleanup jobs—in no small part because 27% of the funds spent go to lawyers instead of to cleanup.[254] Meanwhile, various interest groups lobby to assure that laws, their interpretation, their administration, and those who regulate and administer them will be responsive to the interests involved.

California probably has the most diverse, complicated and difficult environmental laws in the nation for industry and construction. Public opinion has turned against the sheer complexity of environmental regulation since 1990. Serious unemployment has

253. *See supra* notes 203, 248 and accompanying text.

254. *See EPA Previews Its Plan to Clean-Up Superfund*, ENGINEERING NEWS REC., Feb. 14, 1994, at 14. The percent cited as spent on litigation is the official EPA figure.

resulted from the recession and post-Cold War adjustments , and plant moves to escape the poor business climate of California have received great publicity.[255] Nevertheless, environmental regulation has not been changed to decrease the potential for abuse of the permitting process.[256]

255. *See, e.g.*, Robert Reinhold, *Hard Times Dilute Enthusiasm for Clean-Air Laws*, N.Y. TIMES, Nov. 26, 1993, at A1.

256. Amendments effective in 1994 are designed to shorten the permitting period, but the ability of various organizations to assert jurisdiction can thwart improvements.

EXHIBIT 1

TAME T.I.C.

(Program)

1. Tracking T.I.C. (jobs & bidding)
   a. Post cards to contractors
   b. Locals send information
   c. Building Trades, State & Local and computer services
   d. Heavy & Highway
2. Gathering information T.I.C.
   1. Business
      a. computer services
      b. State U.C.C. filings
      c. Searching lawsuits
      d. Search N.L.R.B. records
      e. Checking their banking activities
   2. Safety
      a. Federal OSHA
      b. State OSHA
      c. Workmen comp. cases
      d. Searching lawsuits
      e. Contacting clients of T.I.C. to evaluate which one's [sic] are unhappy with them
3. Developing social economic report on impact to local communities when T.I.C. comes to town.

PRIMARY ATTACK

1. Target jobs T.I.C. is bidding
2. Develop all information on T.I.C. and get to owner's [sic] and generals before job is let.
3. Get social economic report and anti-marketing brochure to local politicians.

T.I.C. LOSES JOB

SECONDARY ATTACK

1. Contacting T.I.C. employees
   a. Challenging T.I.C.'s pension in behalf of employees
   b. Proving forged welding certificates with help of T.I.C.'s employees (also presenting this information to employees (also presenting this information to owners and generals through primary attack.) (above)
   c. Contacting the employees who have been injured on the job through the workmen compensation records and following up the possibilities of third party liability suits.[257]

257. Wilson Deposition, *supra* note 112, at Exhibit 38.