

## RICO Suits Employers Fight Back Against Union Smear Campaigns

By Bryan O'Keefe

*Summary: One of the most important developments in labor relations over the past thirty years has been the union creation of "corporate campaigns." Comprising a broad range of tactics that unions use to pressure employers, corporate campaigns have become an essential part of union organizing drives. But now employers are fighting back. They have come up with a counter-strategy against corporate campaigns, one that has the potential to put some union bosses behind bars.*

George Washington University Professor Jarol Manheim is the foremost expert on union "corporate campaigns," a union organizing strategy that he defines as "a highly sophisticated form of warfare in which a target company is subjected to diverse attacks—legislative, regulatory, legal, economic, psychological—the function of which is to so thoroughly undermine confidence in the company that it is no longer able to do business as usual."

Manheim explains that the very nature of a corporate campaign is that it forces the targeted company to play defense. The employer is constantly responding to labor's relentless and oftentimes unfair attacks.

But employers are turning the tables. In the past year employers have filed three major lawsuits that are holding unions le-

gally accountable for what the employers consider unlawful corporate campaign activities. Their weapon: the federal Racketeering Influenced and Corrupting Organization Act, better known by the acronym RICO.

How these lawsuits are resolved will help determine whether unions are able to successfully wage corporate campaigns

### 'Pattern of Attempted Extortion'

**An Interview With Legal Counsel for Wackenhut Corp.**

A lawsuit filed by the Wackenhut Corporation against the Service Employees International Union (SEIU) is one of the first attempts to hold organized labor accountable for their corporate campaign activities under the federal Racketeering Influenced and Corrupting Organization Act (RICO). The outcome of this suit and other similar suits could have a profound impact on labor relations for years to come.

Representing Wackenhut in the lawsuit are Robert Kent, former Chief of the Complex Fraud Section of the United States Attorney's Office in Chicago, and former National Labor Relations Board member John Raudabaugh. Both are partners in the Chicago office of Baker McKenzie. *Labor Watch* asked them to discuss the Wackenhut case.



Robert Kent      John Raudabaugh

**Please describe the type of corporate campaign that the Service Employees International Union (SEIU) conducted against Wackenhut. When did it start and what type of activities did SEIU engage in?**

SEIU launched its malicious, international corporate campaign against Wackenhut in October 2003, after

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in the future. The outcomes could have a major impact on union-employer relations.

### **Smear Attack**

Corporate campaigns trace their origins to the 1970s, when textile workers unions attempted to organize J.P. Stevens and battled over a contract with Farah Manufacturing. Union leaders were frustrated by what they perceived as anti-union attitudes: overly aggressive anti-union behavior by employers, hostile Republican elected officials, and a National Labor Relations Board (NLRB) election process they regarded as biased against them. The unions claimed these forces were working together to drive down union membership and make it difficult for unions to organize new members.

In trying to organize the companies the unions developed a new strategy to win support. They carefully analyzed the relationships that the textile companies had built up with key community groups, including their customers and shareholders, the local media, elected officials, and prominent community and religious leaders. The unions' goal was to undermine the companies' good name with these "stakeholders." By weakening the companies' reputation, the unions hoped to create intense social and political pressures to force the companies to agree to labor's demands as a way to repair their public image.

In the years since, unions have augmented their tactics of social pressure with a battery of wholesale changes in public

policy to give them the advantage in organizing workers. The most far-reaching is so-called "card check," a proposal to simply eliminate NLRB secret-ballot elections and replace them with a procedure in which employees are invited to sign a card indicating their preference for labor representation. With card check, a workplace is organized as soon as a majority of its employees sign cards—out in the open and subject to harassment. Along with card check, unions want to require employers to sign a "neutrality agree-

ment." This is a type of contract that forbids the company from discussing the pros and cons of unionization with its employees.

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## **The unions give employers two unattractive options: Either allow organized labor to unionize company employees through card check, or watch helplessly as unions attack the company from all angles....**

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ment." This is a type of contract that forbids the company from discussing the pros and cons of unionization with its employees.

The unions are eager to secure laws enacting card check and neutrality agreements, and this is where corporate campaigns prove useful. Currently the NLRB recognizes card check as a legitimate method of union organizing—but only if both the employer and union agree to it. Since card check overwhelmingly favors unions, it's natural that few employers will freely agree to this type of organizing. That's why unions turn to corporate campaigns to force corporations to accept card check and neutrality agreements.

The unions give employers two unattractive options: Either allow organized labor to unionize company employees through card check, or watch helplessly as unions attack the company from all angles with a brutal corporate campaign. It is a lose-lose proposition for the companies.

In many instances companies capitulate rather than face a corporate campaign. They figure that the drawbacks of unionization do not outweigh the potential harm unions can do to their corporate image. But other companies fight back, even though doing so can be expensive and

damaging to their public image. Wal-Mart, for example, faces an especially aggressive corporate campaign. But despite a public relations bruising, the retail giant is still almost exclusively a non-union company.

Employers argue that the last three decades have brought about incredible changes to the economy and to labor-management relations. They say labor unions have been unwilling or unable to adapt their organizations to new economic realities. By relying on corporate cam-

aigns, unions are relying on fraud and extortion—and that's against the law.

### **Fighting Back with RICO**

Recently companies have been fighting back with RICO lawsuits—an innovative strategy that applies existing law to different circumstances. Historically, RICO has been used by prosecutors in criminal cases to stop Mafia racketeering. RICO has also been used in civil cases, usually against corporations accused of fraud or other illegal activities.

"Most of the earlier applications of RICO to labor relations involved Mafia control of industries indirectly through mob domination of labor unions," says Seth Borden, a New York-based labor and employment attorney with Kilpatrick and Stockton, LLP. "Think 'On the Waterfront,' and the clear, traditional examples of racketeering behavior: murder, physical violence, embezzlement, arson."

But now corporations are taking a broader view of what constitutes racketeering. Companies have long complained that corporate campaigns are tantamount to extortion: the corporation is asked to give up something of tremendous value—their employees' rights to a secret ballot election—or face severe economic consequences. Borden says that the le-

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gal expansion of RICO application to include corporate campaigns as a form of extortion is the key issue in recent cases.

“Relevant to most of these cases, extortion, chargeable under state law, is included within the [RICO] law’s definition of racketeering activity,” says Borden. “This wave of suits is truly novel in their definition of extortion in this context. What is new here is the theory that the corporate campaign, in and of itself, constitutes the predicate extortion.”

### **Smithfield Sues UFCW**

The first significant lawsuit was filed this past fall, when Smithfield Foods sued the United Food and Commercial Workers (UFCW) union under a civil RICO action.

Smithfield historically has been at odds with UFCW over the union’s attempts to organize workers at Smithfield pork processing plants. Unable to organize employees through NLRB elections, in 2006 UFCW and the Change to Win labor federation launched a “Justice at Smithfield” campaign, according to court filings. The company accuses the union of employing a variety of hostile corporate campaign tactics, including:

- + trying to lower the price of the company’s stock by distributing incorrect information to stock analysts;
- + issuing false or misleading press releases condemning the company;
- + urging cities to prohibit the sale of the company’s products;
- + directly intervening in the company’s relationship with grocer Harris Teeter by claiming that Smithfield was biased against minority workers; and
- + retaining a labor-affiliated research firm to issue a false report about Smithfield’s handling of workers compensation claims.

In the suit, Smithfield argues that all these attacks have a common goal: disparaging the company and working with labor-allied groups to extort Smithfield into turning over its employees’ representation rights to UFCW.

The company hired the original author of the RICO statute, G. Robert Blakey, to help represent it in court proceedings. Blakey has compared UFCW’s tactics against Smithfield Foods to John Gotti’s

threats, telling the *New York Times*, “It’s economic warfare. It’s actually the same thing as what John Gotti used to do. What the union is saying in effect to Smithfield is, ‘You’ve got to partner up with us to run your company.’”

Smithfield filed the RICO suit in the U.S. District Court for the Eastern District of Virginia, otherwise known in legal circles as “the rocket docket” because it tends to try cases quickly. Depositions are already being heard in the matter, and a formal trial

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is expected to begin early this fall.

Smithfield won a major preliminary decision in late May when the District Court refused a request by UFCW to dismiss the suit. UFCW claimed the right to represent employees was not a property right in the legal sense, which is a requirement for applying the RICO statute. But in his ruling, Judge Robert Payne proposed that it was at least legally plausible that UFCW’s corporate campaign was nothing more than an extortion scheme. He wrote:

In reality, the right to recognize (or not) a union as bargaining representative is among the most valuable and important rights possessed by business owners. The very existence of the Corporate Campaign concept is founded on the recognition that the exercise of that right is of great import and great consequence... By any reasonable interpretation of applicable state or federal law, the Complaint presents facts that plausibly posit the existence of extortion and

thus racketeering activity.

### **Wackenhut Sues SEIU**

Smithfield is not the only victim of a corporate campaign to turn to RICO for its defense. A month after Smithfield sued UFCW, the Wackenhut Corporation filed its own RICO suit against the Service Employees International Union (SEIU), which has waged a corporate campaign against that company for years.

There is a key difference between the corporate campaign against Wackenhut and those that unions have waged against other companies. Under labor law, a union that proposes to represent Wackenhut security guards along with workers in other fields—like janitors and hospital workers—is called a “mixed union,” and it can only represent the guards with the consent of their employer. Since SEIU is a mixed union, it is at an organizing disadvantage. That’s why it favors linking card check to a corporate campaign that will put pressure on Wackenhut to “voluntarily” agree to allow unionization. Earlier, in 2003, Securitas, Wackenhut’s major competitor, signed a card check agreement with SEIU. The union hopes this precedent will further pressure Wackenhut, enabling SEIU to organize the top employers in the security guard industry.

When Wackenhut exercised its legal right to reject unionization, SEIU moved into full corporate campaign mode. The union contracted with the Arizona-based Trevelyan Group to set up several anti-Wackenhut websites to be information hubs during the corporate campaign: They included [eyeonwackenhut.com](http://eyeonwackenhut.com), [wackenhutwhistleblower.org](http://wackenhutwhistleblower.org), [doeswackenhutdiscriminate.org](http://doeswackenhutdiscriminate.org) and [focusongroup4securior.com](http://focusongroup4securior.com), which attacked Wackenhut’s parent company.

SEIU also hired both the Prewitt Organizing Fund and Direct Organizing Group, two Washington, D.C.-area organizations that provide tactical support for corporate campaigns. In addition, the union created a “Stand for Security Coalition” to act as a civil rights lobby for African-American security guards. The organization was a SEIU surrogate during the corporate campaign and helped prevent Wackenhut from receiving security con-

tracts in Los Angeles.

Emails disclosed in the case demonstrate the brazen nature of SEIU's campaign. While the union publicly claimed that it enjoyed a groundswell of local support among rank-and-file workers, savvy Prewitt employees privately admitted that the corporate campaign's goal was to damage Wackenhut's business relationships. In one email, an organizer said:

The events are not intended to necessarily gather public support or mobilize employees or even consumers.... unless we see a real opportunity to do so.... instead they are aimed at the management of the national clients in order to get them to complain directly to Wackenhut and threaten to pull the contract.... So instead of mobilizing workers, we are using pressure to move management.

What makes Wackenhut's RICO claims all the more credible is that SEIU organizers have openly admitted that forcing the company into signing a card check agreement was their goal all along. For example, Wackenhut cites a 2005 deposition in a previous lawsuit from William Ragen, SEIU's Deputy Director of Property Services. In the deposition, Ragen bluntly stated that "the campaign will be over once" Wackenhut signs a "card-check neutrality agreement" and "collective bargaining agreement" that are "pretty much the same as we have with all the other major security contractors."

Depositions in the suit are scheduled for the near future, with a full trial scheduled for April 2009. (For more information on this suit, see the sidebar interview on page 1.)

### **Cintas Sues Unions**

A third RICO complaint was filed in March by the Cincinnati-based Cintas Corporation, a provider of work uniforms, against UNITE-HERE, the Teamsters and the Change to Win federation. Much like Smithfield and Wackenhut, Cintas was the target of a union corporate campaign. In its filing, Cintas alleges that the unions' corporate campaign—called "Uniform Justice"—is a "two-step process. First,

defendants engage in a series of actions and tactics... designed to cripple or materially interfere with Cintas's business. Second... Defendants have made clear to Cintas's management that Defendants' campaign of extortion would cease only on the condition that Cintas enter into a card check and neutrality agreement."

Cintas and its workers have not been afraid to use the legal process against unions in the past. In what helped lay the groundwork for the current RICO cases, a group of Cintas employees successfully sued UNITE HERE for illegally accessing license plate databases. Union organizers used the databases to locate employee home addresses and then proceeded to harass the employees at home to sign union representation cards. The lawsuit was an important attempt by workers to fight back against invasive corporate campaign tactics.

As *Labor Watch* went to press, the Cintas suit was at a preliminary stage of its legal proceedings.

### **Employers Strike Back**

As these three lawsuits work their way through the legal system, their outcomes could have a profound impact on the future of union corporate campaigns. Each of the suits lays out a detailed case arguing that corporate campaigns are nothing more than racketeering schemes.

"The formal papers in these cases all do a fantastic, detailed job of illustrating the horrors of the typical union corporate campaign," says Borden. "The alleged racketeering activity at issue in all the cases contains common elements such as the creation of surrogate organizations to spread negative publicity about the employer, the publication of reports and cleverly disguised websites disparaging the employer, exploitation of other social, political and commercial interests adverse to the employer, filing and publicizing frivolous legal claims and many other tactics."

Labor-management relations could be transformed by the outcome of these cases. If the courts conclude that corporate campaigns are in fact extortion and that unions are liable under RICO statutes, then unions will have to abandon an or-

ganizing tactic which has been highly effective for them.

"Both sides of the labor-management divide must be watching these cases extremely closely," Borden says. "It is no secret that the corporate campaign is the current preferred method of organizers because it is far more successful in unionizing workplaces. It is widely viewed as the way of the future for union organizing."

If it appears that the courts will rule in favor of the employers, organized labor may seek a settlement. They will want to avoid a ruling that prohibits corporate campaign methods outright.

"Organized labor simply cannot afford an ultimate holding outlawing the corporate campaign," warns Borden.

On the other hand, if unions beat back the RICO storm, they will be emboldened to undertake even more corporate campaigns. With the knowledge that the court system does not consider corporate campaign tactics a form of extortion, unions would achieve important legal protections. The legal stakes in all three cases could not be higher.

Whatever their legal outcomes, these suits demonstrate that at least some employers are standing up to hostile union tactics. They are exploring legal remedies to protect themselves. They understand that the unions' greatest strategic advantage in using the corporate campaign model is audacity. By constantly and relentlessly attacking a corporation, unions put most employers in a defensive crouch. It then is left to the employer to defend itself against a blizzard of press releases, rallies, websites, lawsuits, regulatory agency actions and shareholder resolutions.

By contrast, the recently filed RICO suits put unions on the defensive. They force labor unions to defend their tactics against the application of legal statutes like RICO. Far too often, companies respond to a corporate campaign on the unions' terms: Submit to our demands or face ruin. Now, employers are striking back.

*Bryan O'Keefe is a labor policy consultant in Washington, D.C.*

# Wackenhut Interview

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Wackenhut initially refused the union's organizing demands.

The ongoing offensive includes a continual barrage of anti-Wackenhut flyers, newsletters, website publications, public demonstrations and political maneuvering. SEIU and its surrogates aim their false and disparaging statements at Wackenhut's customers, potential customers, employees, the investment community, governments and the public at large, hoping to destroy Wackenhut's relationships with its key business stakeholders.

**The goal of a corporate campaign is usually to have the company in question submit to card check organizing and a neutrality agreement. Was that also SEIU's goal in this instance?**

Yes, in part. SEIU's corporate campaign is designed to strong-arm Wackenhut into signing labor agreements to which SEIU has no legal right. These include a nationwide card check and neutrality agreement, as well as collective bargaining agreements in markets where SEIU already is present. SEIU's objective is to bring all of Wackenhut's security officers under SEIU collective bargaining agreements.

SEIU's corporate campaign strategy is its only option in the security guard industry. As a result of SEIU's choice to be a "mixed union"—to represent both security officers and non-security personnel alike—it cannot, under federal law, represent Wackenhut's security officers as their certified bargaining representative and require Wackenhut to negotiate labor contracts with SEIU. The only way that SEIU can lawfully represent Wackenhut's officers is by voluntary recognition, requiring Wackenhut's consent.

Wackenhut refuses to agree because SEIU's mixed union approach would undermine Wackenhut's core business function—providing quality security services—and would deny Wackenhut's employees their statutory right to free choice. SEIU's response to Wackenhut's exercise

of its lawful right to refuse SEIU's demands is their campaign of extortion designed to coerce that consent. SEIU is motivated by its desire to maximize its membership and resulting income from dues and fees.

**The use of the RICO statutes to hold unions accountable for their misleading corporate campaign activities is novel. Can you explain how you decided to pursue this legal course?**

Civil RICO has been used in this context before, but not extensively. We reviewed the law relating to RICO extortion and the facts of SEIU's campaign against Wackenhut, and determined that a civil RICO claim against SEIU was appropriate.

**Why do you think that you will ultimately prevail in this litigation?**

We think that we have the law and the facts on our side. SEIU has engaged in a pattern of attempted extortion for the purpose of obtaining Wackenhut's property, and that is a civil RICO violation.

**What is the current status of the case? Is a trial expected sometime in the near future?**

The case is now in the early stages of discovery. Depositions of SEIU's top officials will follow in next few months. The case is scheduled for trial April 2009.

**Perhaps the greatest advantage that unions have with corporate campaigns is that they force employers and corporations to only play defense—that is, defend themselves against a union's attacks. This RICO suit turns the tables and allows a company to play offense against the union. Can you explain the importance of playing offense when it comes to defending your employees and your company's reputation?**

Extortion must be dealt with by all available means.

**What effect do you think this suit will have if you do, in fact, win? Do you think**

**SEIU and other unions will be less likely to pursue corporate campaigns?**

It remains to be seen whether the SEIU will conform its behaviors to lawful means. The law provides for employee choice. For the time being, extortion to force companies to give in to union demands and union coercion to force employees to unionize is illegal.

**How does a suit like this fit into the broader discussion of the current state of labor relations? Many traditional labor lawyers did not envision RICO suits becoming part of labor law.**

Unions argue for more potent remedies. Employees and companies have a case too. Remedies exist for illegal extortionate acts—"traditional" labor lawyers can think "outside the box."

**Is it at least possible that if these suits are successful we could see a Democratic Congress try to change the RICO statutes to prevent employers from suing labor unions?**

Given Labor's constant touting of its 2009 agenda to be delivered by its purchased IOUs, any pro-labor reform will result in more offshoring, outsourcing and, maybe, just maybe a truly united competitive corporate community.

**Please remember Capital Research Center in your will.**

# Labor Notes

## **Bush May Veto Mandatory Collective Bargaining Bill**

A federal bill supported by unions and their Democratic allies, the Public Safety Employer-Employee Cooperation Act (H.R. 980), would force states into collective bargaining with unions for firefighters, police and other public safety workers. The bill passed in the House but, as *Labor Watch* went to press, had stalled in the Senate because of co-sponsor Sen. Ted Kennedy's brain tumor surgery. Regardless of whether the bill is approved, media reports indicate that several of President's Bush's cabinet members oppose the bill, and a veto is likely. That would probably force Democrats to hold the bill until next year, when they hope to pick up additional seats.

## **Democrats Expand Scope of Davis-Bacon Law**

The Davis-Bacon Act of 1931 is a Depression-era law guaranteeing median wages and benefits to workers in any federally assisted construction project costing more than \$2,000—but the employer surveys used to determine these “median” rates are often significantly biased toward inflated union wages. Beholden to labor unions, Democrats in Congress are aggressively trying to expand the Davis-Bacon mandates to other federally funded programs. As *Labor Watch* went to press, the Senate was considering climate change legislation that would require Davis-Bacon wages for federally subsidized workers at renewable-energy facilities. In June, the House passed bills tying Davis-Bacon mandates to federal funds for school construction, passenger rail and alternative energy projects. Last December, President Bush signed into law the “Energy Independence and Security Act,” in which Democrats included a provision funding only those organizations that partner with labor unions; last month Rep. John Kline (R-MN) introduced a bill to correct the “error.”

## **United Steelworkers of America to Merge With British Union**

Amid labor union concerns about corporate globalization, the United Steelworkers of America has agreed to a merger with UNITE, the largest union in Great Britain representing energy, transportation and public-sector workers. (UNITE is unrelated to the American union UNITE-HERE.) The new three million-member union results from the first transatlantic merger, a response to the increasing mobility of workers and the global reach of most industries. But perhaps the greatest motivation for this and likely future international mergers is the common loss of members; from 1970 to 2003, New Zealand's union membership declined 33 percent, Australia's 27 percent, Britain's 15 percent, France's 13 percent and Germany's 9 percent. “While big business is global, and labor is national, we're going to be at a disadvantage,” warns UNITE spokesman Andrew Murray.

## **NEA Triples Funds to Advocacy Groups**

An Education Intelligence Agency analysis of the National Education Association's financial disclosure report for the 2006-07 fiscal year finds that the teachers union nearly tripled its contributions to advocacy groups for a total of \$12 million. Not surprisingly, the increase is directly related to the 2006 election year and 2007 ballot initiatives. The NEA gave \$2.3 million to Citizens for Education to urge support for a school funding initiative in Michigan. Other grants supported ACORN, Amnesty International, the Human Rights Campaign, Rainbow/PUSH, the Sierra Club and dozens of other groups.

## **Exploding Myths About Prevailing Wages**

The Minnesota Taxpayers Association reports, “In many cases, the government-determined prevailing wage is 30 to 40 percent higher than the wages paid to an average laborer undertaking the same work on a job which is not subject to the prevailing wage requirements.” This is just one of the factoids presented in a new series of reports on state “prevailing wage” laws, published online at [www.workerfreedom.org](http://www.workerfreedom.org) by the Alliance for Worker Freedom (AWF), a project of the American Taxpayers Union. AWF is analyzing the laws in several states and documenting the damage they are causing to taxpayers, workers and business owners.