

PART V

UNION PICKETING

1. LEGAL AND ILLEGAL UNION PROTESTS

It is generally legal for unions to peacefully hand out truthful fliers, also known as handbilling, on public property.

Unions also may be entitled to peacefully picket (patrolling across entrances with or without signs) in a manner that does not interfere with the rights of neutral parties (such as customers, potential customers, other contractors and members of the public).

Non-confrontational “bannering” or “rat balloons” outside entrances also have been allowed, where no picketing of neutral parties is ongoing.

On the other hand, the following union actions, depending on the circumstances, are generally illegal:

- trespassing on private property;
- making or handing out knowingly false and defamatory statements;
- blocking entrances;
- mass demonstrations or similar disruptive conduct (such as using bullhorns in ways designed to disturb or offend neutral individuals);
- “secondary” picketing (i.e., coercing neutral customers/contractors);
- picketing with organizational intent for more than 30 days without filing an election petition; and
- violence.

2. SECONDARY PICKETING AND RESERVED GATES

Unions have the right to picket contractors with whom they have a labor dispute. However, “secondary” picketing is picketing aimed at “neutral” employers, including customers and subcontractors, and is generally prohibited by LMRA. The Supreme Court and the NLRB have established a legal doctrine designed to prevent secondary picketing against neutral contractors on a common worksite, known as the reserved gate doctrine. Under this doctrine, the NLRB requires picket signs to state truthfully against whom any picketing is being conducted. Picketing must be done only at times that the target firm is engaged in work at the jobsite. Finally, the picketing must be done as closely as possible to the area in which the target firm is working. Under these principles, picketing at entrances reserved for neutral employers is subject to injunction.

To make appropriate use of the NLRB's reserved gate policy, whenever picketing is anticipated, it is recommended that reserved entrances be established by the owner of the property or the person with control over the use of the property, or a neutral in the labor controversy. Reserved entrances must be clearly separated and must be the only entrances used to enter or leave the project. Block off all unmarked entrances. The entrances must be clearly marked so that anyone approaching the project or place of business will know which entrance to use. Place entrance numbers on the backs of the sign so that people leaving the area also will be able to identify the entrances.

The entrance that employees of the primary or targeted employer (including all members or management) and suppliers use to enter and leave the project or place of business should be posted with a sign that states:

GATE ONE

This entrance is reserved for the exclusive use of employees,
business visitors and suppliers of **PICKETED EMPLOYER**

All other persons must use gate two.
These restrictions are strictly enforced.

The entrance that all other persons use to enter and leave the project or place of business should be posted with a sign that states:

GATE TWO

This entrance is reserved for the exclusive use of employees,
business visitors and suppliers of

NEUTRAL EMPLOYER 1

NEUTRAL EMPLOYER 2

NEUTRAL EMPLOYER 3

All employees, business visitors and suppliers of
PICKETED EMPLOYER must utilize gate one.

These restrictions are strictly enforced.

Alternatively, the gate two sign can be worded in the negative, so as to avoid identifying the neutral contractors, as follows:

GATE TWO

This entrance may not be used by
PICKETED PRIMARY EMPLOYER and its employees.

This entrance is reserved for the exclusive use of employees
and suppliers of neutral employers.

The signs should be on three-foot by four-foot exterior plywood (or similar material) with a white background and black lettering of one inch. There is no limit to the number of entrances you may establish, provided each is properly marked. It is critically important that these entrances not be misused once they are established. The entrances must be observed by members of management as well as all other employees.

The final step in making the reserved entrances effective is to contact the union, describe the reserved entrance system to them, and assure the union that your employees and suppliers will only use entrance No. 1 (or whichever entrance or entrances that you are entitled to use). This contact should be in writing with a return receipt requested so it will be easier to prove should litigation be necessary. If the union fails to adhere to the reserved gate system, an unfair labor practice charge should be filed with the NLRB, together with a request for an injunction.²

3. BANNERING AND OTHER FORMS OF UNION PROTESTS

Different rules may apply when a union engages in non-coercive bannering or handbilling, as opposed to picketing. In **DeBartolo v. Building Trades** (1988), the Supreme Court held that unions have greater rights to inform the public of their views about an employer when no coercive picketing is involved. However, false statements or flyers by union agents may be actionable in court under state defamation laws, if the statements are made with knowledge of falsity, are defamatory in nature, and result in special damage to the employer.

In the 2010 case **Eliason & Knuth** and subsequent decisions, the NLRB extended the Supreme Court's **DeBartolo** holding to protect the right of unions to post stationary, non-confrontational banners outside jobsites and even in front of neutral customer offices. A federal appeals court, however, held in **Fidelity Interior Construction v. Carpenters** (11th Cir. 2012) that coercive union tactics against neutrals that included both bannering, picketing and other forms of disruption justified a substantial jury verdict against the union under federal secondary boycott laws.

The Supreme Court also has held in the case **Lechmere v. NLRB** (1992) that union banners, handbills and pickets can be kept off private property, so long as such exclusion is enforced in a nondiscriminatory manner, and so long as unions have other means to communicate their message. Proper posting and enforcement of no trespassing policies are important to preserving fundamental property rights on construction sites. Employers should obtain legal counsel wherever a question arises about union claims of access to private property.

Other cases have addressed whether union noisemakers (amplifiers, etc.) are lawful under both the NLRA and local ordinances. In 2019, the NLRB's General Counsel asked the NLRB to revisit the legality of union "rat balloons," which are confrontational and should be viewed as forms of coercion. Several cases are pending before the NLRB that could change the rules governing this favorite union tactic. Legal counsel should be consulted with regard to the legality of particular union tactics under the latest case law.

² Even where a union is engaged in picketing or similar activity at an appropriate entrance, there are other legal ground rules that may come into play. First, the NLRB has held under Section 8(b) (7) of the NLRA that unions cannot engage in "organizational" picketing for more than 30 days without filing an election petition. To evade this rule, unions frequently direct their picketing toward an employer's alleged failure to pay "area standards" wages. Where it can be shown that such "informational" picketing is really intended to organize the employer's workers, an injunction can be requested from the NLRB.

4. VIOLENCE AND MASS PICKETING

Sometimes unions will resort to violence or mass picketing in order to keep merit shop contractors from working. When such acts occur, the contractor should be advised to seek emergency relief in a state court. All state courts have the power to issue injunctions to maintain public order and safety.

Some state courts are more helpful than others and some states have passed laws restricting the use of injunctions in labor disputes. It may be necessary to show that the police are incapable or unwilling to restore order, or that mediation has been attempted, or that other requirements have been met. The chapter attorney should be familiar with the procedures for obtaining state (or sometimes) federal relief.

It is also important that merit shop contractors assist the construction user in obtaining necessary police support and state, or federal court injunctive relief, by doing the following:

- Notify responsible local police officials that picketing is or soon will be expected. Request police protection.
- Maintain a detailed log of all events on the picket line, including eyewitness accounts, photographs and/or videotapes.
- Contact the international union, where appropriate, to inform them that they will be held responsible for any violence or damage committed by local representatives.
- Consult labor counsel as to the appropriate time for filing a court action seeking injunctive relief against union violence. Do not merely rely on the construction user to deal with the courts.
- Consult labor counsel as to whether civil damages can be sought under recent court decisions applying the Racketeering Influenced Corrupt Organizations Act (RICO) to union violence and extortion.

5. PICKET LINE CHECKLIST

The following steps should be considered by any contractor confronted by picketing or handbilling. Jobsite managers should be made aware of these points in advance of any protests so they will know how to respond.

Enforce No Trespassing Policies (Know Your Property Rights)

Under settled law, outside union agents have no right to solicit employees or residents on private property, so long as management has not permitted other solicitors to engage in such onsite activities. Non discriminatory enforcement is key. Any union agents who enter a property unlawfully should be asked to leave. If they refuse, the police should be called. Management should not attempt to physically restrain anyone. Standard security procedures should be followed.

Be sure to learn the limits and extent of the property lines of any jobsite's private property, and know who is responsible (owner, general contractor or subcontractor) for enforcing property rights. Be familiar with any conflicting contractual requirements. Have police phone numbers available and make contact with local law enforcement in advance if possible to familiarize them with the situation and ensure quick response. But first check with legal counsel.

Maintain Incident Reports/Logs

When union activities occur, make notes of what happens: the number of union agents, what they did, what their signs or fliers said, where they were located, when the activity occurred, their impact on residents or neutrals entering facilities, potential witnesses and any arrests.

Notify Corporate Management Immediately of Any Union Activity

Except in emergency or self-defense situations, contact senior management as soon as possible when union activity begins. This is important not only to help each manager determine the best immediate response to union activity, but also so that senior management can build a case for a possible legal challenge to potentially unlawful union activity.

Be Careful with Cameras

Film potentially unlawful or disruptive union conduct. However, do not film peaceful distribution of handbills or non-disruptive picketing off of private property. (Labor law prohibits surveillance of lawful union organizing activity). Do film any acts of trespass on private property, any mass demonstrations and any picketing that results in coercion or intimidation of residents or potential customers. For your own safety, do not get close to the picket line (or in it) with the camera. Film in an unobtrusive manner.

Notify the Police and Consider Increased Security

Depending on the scope of union activity at a particular facility and the police response, additional security arrangements should be considered for the protection of residents and property against vandalism and/or intimidation.

Consider Special Entrances for Construction Contractor Employees

Where unions engage in picketing (patrolling entrances, usually carrying signs), labor laws require the pickets to be limited to locations where the primary employer is located or enters a facility. If multiple employers are present, the law permits separate entrances to be established so that pickets can be limited to the entrance being used by the primary employer with whom the dispute exists. Depending on the facility being picketed, separate entrances should be considered, in consultation with legal counsel, as a means of limiting the location of the pickets and keeping them away from neutral residents or employers.

Do Not Threaten or Harass Picketers

Except where they engage in trespass, there is normally no reason to engage in dialogue with picketers or handbillers. Do not engage in shouting matches. Trespassers should be told firmly to leave the property; if they refuse, the police should be called. It also may be advisable to obtain some form of identification from anyone who appears to be in charge of picketers or demonstrators. Otherwise, there is normally no need to communicate with union agents.