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**Construction Worksite Labor Problems:  
Part 1 – Diagnosing the Problem**

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## INTRODUCTION

Among the many varieties of problems that can beset a construction project, including adverse weather, unexpected soil, substrata or hydraulic conditions and unanticipated material shortages or fluctuations in price, worksite labor relations problems can be particularly frustrating. Weather and other common problems are capricious. Following Murphy's Law, they often seem to occur at particularly inconvenient times, but labor problems *usually* arise at a time and location where they are specifically calculated to cause the most damage and generate the greatest leverage for the initiator. The purpose of this workshop and the accompanying papers is to provide tools for the general construction lawyer to:

- anticipate and understand a range of labor relations issues that may impact their clients' construction projects;
- plan to avoid such issues, if possible, or minimize the impact of labor problems if they do occur; and
- respond promptly and appropriately if labor problems do arise.

From the perspective of the typical construction contractor or subcontractor, construction worksite labor problems generally involve one of three scenarios.

**Scenario One:** The client contractor's own employees become involved in a dispute that results in a work stoppage or picketing. This scenario can occur when a union signatory client contractor's employees strike over a dispute or refuse to handle certain materials, either because the products diminish work opportunities for the contractor's work force or because they do not carry a union label. This scenario can also arise for a non-union client contractor when its activities on the worksite are picketed by a union seeking to organize its workers or protesting the contractor's lack of a labor agreement with the union. Lastly, this scenario can arise when several unions make conflicting claims to jurisdiction to perform certain tasks at the jobsite and resort to picketing.

**Scenario Two:** A dispute between some other contractor on the jobsite and that contractor's employees causes the client contractor's employees to cease work. Scenario Two can arise when the client contractor's employees choose to strike in sympathy with the other contractor's workers or when they simply refuse to cross or work behind a picket line that has been set up on the job.

**Scenario Three:** A work stoppage by a supplier's employees results in a disruption on the worksite. Such disruption can occur when a strike shuts down a key supplier's fabricating plant. Suppliers' labor disputes can also directly impact a construction worksite when a union involved in a dispute with a material supplier or delivery contractor chooses to "picket between the headlights" of the delivery vehicles when they attempt to access the construction site, causing the client contractor's employees to cease work.

As later sections of this article will explain, one key to addressing many of these common construction worksite problems lies in distinguishing primary union activity (which is generally lawful) from secondary activity (which is generally unlawful).<sup>1</sup> Greatly simplified, primary activity generally involves union actions targeted directly at an employer with whom the union has a dispute. For example, when the employees of "ABC Plumbing" are on strike, a picket line set up by the plumbers' union at ABC's warehouse is a classic example of primary activity. Secondary activity involves pressure brought to bear on a "neutral" third party to try to force the third party to cease doing business with the union's primary target. An example of secondary activity, using the same dispute identified in the first illustration, would exist if the plumbers' union were to establish picket lines at the headquarters of the general contractors who subcontract with ABC Plumbing or at ABC Plumbing's bank in an effort to force them to cease doing business with ABC.

Identifying primary and secondary activity is relatively straightforward when there is only a single employer working at a particular location. What makes distinguishing primary from secondary activity a challenging undertaking in the construction setting is the fact that many

different employers – owners, architects, general contractors, subcontractors and material suppliers – are often present at the same time on the typical construction project. Over the years the National Labor Relations Board and the courts have developed a number of specialized rules for dealing with the problems of distinguishing lawful primary from unlawful secondary activity in “common situs” work places where many employers and their employees are at work simultaneously.

The general construction lawyer will find it useful to develop at least an elementary understanding of the distinction between primary and secondary activity to understand the range of remedies that may be available to deal with different types of labor problems and to select the appropriate remedy for the particular problem at hand. A general understanding of this distinction and the particular challenges confronted at the common situs work place is also important for the attorney attempting to plan in advance to avoid labor problems or minimize such problems if they do arise.

### **PLANNING TO MINIMIZE POTENTIAL LABOR PROBLEMS**

Careful planning can help the construction contractor avoid worksite labor problems altogether. If such problems nevertheless do arise, planning will almost always help minimize the damage that is caused and hasten the problem’s resolution. Planning in this context generally proceeds on three complementary tracks.

#### ***Planning Track One: Assessing the Labor Relations Climate.***

A careful contractor should evaluate the labor relations “climate” in the area of the construction project to assess what kinds of problems are most likely to arise. Included in this element of the planning process is an evaluation of the contracting patterns typical in the project area.

- Are most projects of the type the contractor will undertake in the area generally handled by all union or all open shop contractors?

- Or, are many projects in the area built by a mix of both union and non-union contractors?

The local labor relations history of the crafts involved in the project can also be informative.

- Do particular crafts often refuse to work behind another union's picket line even when proper reserved gates have been established?
- Conversely, are there crafts that have a recent history of remaining on the job, notwithstanding the presence of another union's pickets elsewhere on the jobsite?

The status of key collective bargaining relationships in the area is also important.

- Is there active union organizing activity in the area targeting particular contractors?
- Will collective bargaining agreements with any key crafts expire during the construction project?
- Are there national collective bargaining agreements that may be available to cover the work involved and will the local labor unions cooperate in implementing the national contracts' provisions?
- Is there a project labor agreement in effect for the project?<sup>2</sup>
- Is there a recent history of jurisdictional disputes over elements of the work to be contracted, and, if so, how have such disputes typically been resolved?
- If the proposed project will involve new products or construction techniques such as prefabricated components that impact the amount of jobsite labor required, is there a history of work preservation or jurisdictional disputes involving the crafts that will be handling their installation?

State and local contracting laws, regulations and policies should also be assessed.

- Will the job be subject to prevailing wage laws or regulations?

- If the contractor intends to use composite crews, helpers, pre-apprentices or other non-traditional classifications, are such classifications recognized in the local prevailing wage determinations?

A number of useful resources are available to the contractor to help answer these and other labor “climate” questions. First, (and in the nature of a shameless plug) the contractor and the general construction attorney can benefit from developing a relationship with an experienced labor lawyer. Federal labor law is an arcane practice area replete with complicated and non-intuitive rules established by the National Labor Relations Board, federal and state courts and administrative agencies. A labor lawyer contact can provide the contractor and the construction lawyer a ready source of answers to general labor law questions, assistance in planning and drafting contract documents and a referral link to local labor counsel in the area where the project will be built. Local labor counsel can provide intelligence about the labor relations climate in the locale and first-hand information about practice before the local regional office of the National Labor Relations Board and local courts.

Other sources of valuable data about the labor relations climate in the project area include contractors’ associations such as the Associated General Contractors of America, Associated Builders and Contractors, Mechanical Contractors Association of America, National Electrical Contractors Association, Sheet Metal and Air Conditioning Contractors’ National Association and the American Subcontractors Association and their local chapters. Because the local chapters of some of these organizations such as the AGC, MCA, NECA, SMACNA and others often serve as collective bargaining representatives for management and participate actively in handling grievances arising under local collective bargaining agreements, they can be a particularly useful source of information about upcoming labor contract expirations, recent jurisdictional and work preservation disputes and other work stoppages.

Developing as complete a profile as possible of the labor relations climate in the project area even before bidding a job will help the contractor make key decisions about whether to subcontract portions of the work and whether the use of certain subcontractors will heighten the likelihood of picketing or other labor disputes on the job. It may also help the contractor to identify risk and responsibility issues that it will wish to deal with in its contracts with other parties.

***Planning Track Two: Anticipating Common Construction Worksite Disputes***

After assessing the labor climate in the project area, contractors can take additional steps before work commences to minimize the risk that problems will arise and to speed the resolution of such problems if they do occur. A key element of this part of the contractor's planning is to examine the construction site and the routes of access in order to plan for the use of reserved gates if they are necessary.

One of the accommodations the NLRB and the courts have recognized to deal with the problem of distinguishing primary from secondary activity on common situs construction worksites is the "reserved gate." It has long been acknowledged that even the most directly targeted primary activity such as a picket line established at the target employer's headquarters, may produce some secondary consequences.<sup>3</sup> Sympathetic third party employers may choose not to deal with the struck company and third party employees may choose not to cross a primary picket line. The NLRB will not find primary picketing to be unlawful simply because it causes some secondary effects.<sup>4</sup> On the other hand, where ostensibly primary activity appears calculated to cause widespread secondary effects, the NLRB and courts carefully evaluate the union's actions to determine whether the activity unnecessarily enmeshes secondary employers.<sup>5</sup>

In the picketing context, the NLRB generally applies what it calls its "*Moore Dry Dock*" standards to determine whether a union's picketing is lawful primary activity or unlawful secondary activity. These standards include.

. . . (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.<sup>6</sup>

In the construction environment, the *Moore Dry Dock* standards have led employers to attempt physically to separate employers with labor problems from other "neutral" employers by maintaining separate "reserved" gates for different contractors. When a separate gate is reserved for neutral employers and the union nevertheless pickets at that entrance, the NLRB will generally find that the union is engaging in unlawful secondary activity, because it "is self evident that picketing a gate used solely by . . . neutral subcontractors demonstrates [a secondary purpose]."<sup>7</sup>

Careful attention to the possible use of reserved gates thus becomes one of the most important elements of construction worksite labor relations planning. Ideally, the contractor should evaluate the worksite geography to identify possible reserved gate locations even before work commences. Selection of suitable gates is important. Gates should be as widely separated as practicable. If gates are established too close to one another, a union may confine its picketing to the primary employer's gate and still be highly visible (and thus have an adverse impact) on employees and delivery persons seeking to use the secondary gates.

A choice of location for the gate should also be made with an eye to minimizing disruption of other activities at the worksite. As an example, it is not advisable to establish a reserved gate for use by a non-union contractor at the entrance that the owner's unionized employees or its unionized shipping company are expected to use.

The contractor should also plan to take steps to avoid having its dual gate system "tainted" by allowing employees or material suppliers of the primary employer to use the gate reserved for secondary employers. A union may lawfully picket wherever the primary employer's workers enter or leave and wherever the primary employer's deliveries are made.<sup>8</sup> Thus, if the primary employer's

workers enter or leave through the secondary gate, the union can lawfully picket there and continue to do so until affirmative steps are taken to effectively segregate the primary and secondary employees and suppliers.<sup>9</sup>

Contractors contemplating the use of dual gates should ensure that they have clear signage available to mark each gate. The language used should be direct and the signs should be easy to read from a distance in order to minimize the risk of inadvertent entry through the wrong gate. Sample language for reserved gate signage is found in Appendix A.

Whenever the contractor's assessment of the labor climate suggests that reserved gates may be necessary, it is a good idea to identify the gates and erect the signage at the inception of the project before any picketing occurs. Having the gates in place from the beginning of a project may avoid the work interruption that almost invariably occurs if signs are not erected until after pickets first appear. Moreover, all of the parties working on the construction site are more likely to be familiar with the location and purpose of the reserved gates before any picketing occurs if they are erected early in the project. Contractors who intend to use reserved gates should also ensure that their reserved gate plan is carefully communicated to all other key employers on the worksite. As a part of this communications plan, the contractor should reinforce the importance of limiting access to a particular gate *solely* to the contractors and other parties identified on the gate's signage.

Other "geographic" considerations should also be a part of the contractor's plan. Picketers typically have a right to be present on a public right-of-way so long as they do not physically block ingress or egress to a worksite. They do not, however, generally have an unfettered right to enter private property for the purpose of picketing.<sup>10</sup> Barring picketers from private property may create legal problems, however, if other "strangers" are permitted unrestricted access to the worksite.<sup>11</sup> Thus, a contractor's site security plan should consider restricting entry to the worksite only to authorized parties and the contractor may wish to post the property against unauthorized entry by

others such as construction workers' families and visitors. Safety concerns also frequently militate in favor of such a policy.

Determining who has the legal right to control access to the premises can be important in cases where picketers attempt to enter onto private property. The NLRB and the courts have found unlawful efforts to bar such picketers by persons with no legal right to control access to the property.<sup>12</sup> For this reason, the contractor may wish to secure from the owner, general contractor or construction manager an exclusive or non-exclusive right to regulate access to the worksite.

Advance planning should also include an analysis of the potential problems that material deliveries may cause on the job. If a material supplier becomes involved in a labor dispute while a construction project is under way, the supplier's activities may be picketed while the supplier is present on the worksite. This is what is commonly referred to as "ambulatory" picketing or "picketing between the headlights." Because the supplier is generally expected to use the same gate as the contractor to whom it is making deliveries there is a possibility that the contractor's operations will be interrupted whenever a delivery must be made.<sup>13</sup> Careful planning can insure that secure on-site locations for storing stockpiles of materials are available in such circumstances to limit the trips the supplier must make to the jobsite or to permit deliveries to be planned to take place at times when other workers will not need to be at work at the jobsite.

While relatively few construction worksite labor disputes typically involve violence, mass picketing or concerted efforts physically to block ingress or egress, incidents of vandalism may be somewhat more frequent. Planning to address these issues of violence, trespass or vandalism can involve meeting with local law enforcement officials to introduce the contractor's key representatives and to provide the law enforcement agency with an overview of the kinds of problems the contractor envisions or has experienced in the past. Additionally, because an effective remedy for these types of problems generally requires the contractor to seek a state court injunction,

the contractor should consider taking advance steps to arrange with its surety for an injunction bond to be available if resort to the court is required. Here again, identifying a local attorney and providing some familiarization with the project and any problems the contractor anticipates can speed remedial action.

An additional bit of planning can accelerate efforts to deal with a labor problem. A comprehensive “players list” of key contacts, including names, addresses, telephone numbers and e-mail addresses for the owner, general contractor, construction manager, other subcontractors and key material suppliers, contractors association representatives, union business agents and law enforcement resources will shorten the response time needed by a labor lawyer or other advisor called in to help resolve a crisis.

Lastly, with respect to Planning Track Two, it is critical for the contractor to become thoroughly familiar with the provisions of any collective bargaining agreements that will be applicable at its worksite. This must include any “no strike” provision, any “picket line clause” protecting employees’ rights to honor a picket, and any hiring hall or referral procedures that require the employer to seek workers through the union. In the event that a contractor’s workers choose to honor a picket line on the job, the contractor may come under extreme pressure from the owner, construction manager or general contractor to resume work, and the contractor must be thoroughly familiar with any limitations on its right to hire replacement workers or to subcontract the work to an employer who will man the job.

### ***Planning Track Three: Drafting Contract Documents to Address Potential Labor Disputes***

The third planning track involves careful analysis of the contract documents that will establish the contractor’s rights and responsibilities and negotiation of key provisions as necessary to assign accountability and allocate risks. The typical contract document templates used by many owners, architects, contractors and subcontractors provide only limited guidance to the parties in

dealing with issues arising from labor disputes.<sup>14</sup> This may not be surprising since these documents often are the product of collaborative drafting and reflect an effort to balance the interests of the parties.

The most common threat posed to a typical construction project by a labor dispute is delay. At common law “delay[s] caused by labor disputes are normally excusable.”<sup>15</sup> This approach is reflected in the standard provisions of the AIA’s “General Conditions of the Contract for Construction,” AIA Document 201-1997, which states: “[i]f the Contractor is delayed at any time in the commencement, or progress of the work by ... labor dispute, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor’s control, ... then the contract time shall be extended by change order for such reasonable time as the Architect may determine.”<sup>16</sup>

On many projects such an approach to the potential delay caused by labor disputes may be acceptable, but for particularly time-sensitive projects, or projects in an environment where labor disputes have caused frequent or costly disruptions, one or more of the parties may want to anticipate, assign responsibility and allocate the risk of potential delays in the contract documents by negotiating specific modifications of standard terms in order to achieve this goal. A number of useful resources exist to provide assistance in drafting such modifications, including James Acret & Annette D. Perrochet, Construction Industry Formbook, (3d Ed. 2007).

Customized labor relations contract terms can be used to deal with a variety of subjects, including:

- Assigning responsibility and risk to a party involved in a labor dispute.

Some modified terms assign the risk of delay caused by labor disputes by excluding strikes, picketing or labor disputes from the list of “excusable” delays.<sup>17</sup> Other more narrowly drawn provisions may excuse labor dispute delays only when the dispute is not foreseeable or beyond the control of the contractor, or when it does not involve the contractor’s employees.<sup>18</sup> Such

modifications are often accompanied by a change to the default provision making a contractor's failure to proceed with the work on account of a labor related delay a default, permitting the owner or contractor to "eject" the contractor or subcontractor and allowing the owner or contractor to perform the work or have it done by others.<sup>19</sup>

Parties contemplating negotiating the default provisions of their contract may want to pay particular attention to the "notice" and "time to cure" terms of the agreement. The standard AIA language allowing seven days written notice to cure a failure to proceed before a default may be declared can frustrate enforcement of an otherwise carefully drafted default clause, especially when a project is affected by a series of different labor disputes.<sup>20</sup>

A particularly controversial approach to dealing with labor disputes in the construction contract is through use of a so-called "harmony" clause. Certain provisions of this type assign the risk of delay to the party whose presence on the jobsite precipitates a labor dispute, even if that party is willing and able to proceed with its work. An example of such a provision in the CONSTRUCTION INDUSTRY FORMBOOK, states in part, "[i]f subcontractor's presence on the job causes picketing or other obstructive union activity, it shall be considered a default by Subcontractor and Contractor may immediately remove Subcontractor from the job...."<sup>21</sup>

A somewhat less draconian version of a harmony clause allows what amounts to a "termination for convenience" by the contractor in such a case:

"Regardless of whether Subcontractor is a union signatory, in the event that picketing, strikes, or other labor disputes develop on the project because of the presence of Subcontractor or its subcontractors or suppliers, Contractor shall have the following cumulative rights: (a) to deny Subcontractor access to the jobsite until the labor dispute has been resolved, and Contractor shall not be liable for any damages incurred by Subcontractor as a result, (b) to eject Subcontractor from the jobsite and terminate Subcontractor's performance under this Subcontract, in which event Subcontractor shall be paid the reasonable value, as measured by the Subcontract

price, of work performed and actually installed up to the time of such termination,....”<sup>22</sup>

- Passing on a contractor’s labor relations obligations to its subcontractors.

In many cases a contractor may have its own collective bargaining contract obligations. For example, a contractor may have agreed to subcontract work only to a union signatory subcontractor or to one that pays “area standard” wages and benefits. In such a case the contractor will want to insure that its subcontractors abide by these obligations. An example of such a clause is: “[w]here a collective bargaining agreement exists, Subcontractor warrants that it shall remain in full force and effect between Subcontractor and the appropriate trade union or unions for the duration of this Contract. Subcontractor agrees to furnish Contractor with evidence satisfactory to Contractor that all wage and fringe benefits payments under the Collective Bargaining Agreement have been made and are being kept current....”<sup>23</sup>

- Insuring the effectiveness of reserved gates.

Parties anticipating the use of reserved gates may want to include terms obligating contractors and subcontractors to honor the gates and cooperate in keeping them from becoming “tainted.” Such terms may even provide for an assessment of liquidated damages for a breach caused by a contractor’s employees or suppliers. The following example from the Construction Industry Formbook deals comprehensively with this issue:

78. Picketing: If picketing should occur on the jobsite, Contractor may employ a reserved gate system. In such event, Subcontractor will take such measures, including the posting of a watchman at the neutral gate, to make certain that all of its personnel, workers, suppliers, and materialmen utilize no gate other than the one designated for them by Contractor. In the event that Subcontractor or its workers or suppliers should contaminate the neutral gate, Subcontractor will pay Contractor liquidated damages of \$\_\_\_\_\_ per day until reestablishment of the neutral gate. It is agreed that contamination of the neutral gate would cause Contractor economic damage in the form of delay and lost productivity, but that such damages

would be extremely difficult and impracticable to compute, and the parties have therefore agreed that \$\_\_\_\_ per day is a reasonable approximation of Contractor's actual damages in such event.<sup>24</sup>

- Assigning responsibility for initiating remedial actions.

Contracting parties may choose to make a specific assignment of responsibility for taking remedial action in the event that a labor dispute arises. For example, a general contractor wanting to insure that its subcontractor experiencing a work stoppage is primarily responsible for dealing with any adverse or unlawful consequences, might consider the following provision: “[i]f a labor dispute involving Subcontractor or Subcontractor’s suppliers causes any disruption or delay on the project, or interferes with the work of the owner, contractor or any other subcontractor, Subcontractor shall, at Subcontractor’s cost, immediately take all reasonable and appropriate actions available to Subcontractor to address such disruption, delay or interference, including, but not limited to filing appropriate grievances, lawsuits or charges. In the event that Subcontractor fails or delays in taking such action, Contractor may do so, and, in such event, Subcontractor shall be liable for the reasonable costs, including attorney’s fees incurred by Contractor.”<sup>25</sup>

Lastly, mindful of the NLRB’s rule that a party seeking to bar “trespassory” picketing from private property must first establish that the party has a legitimate right to control access to the property, the contract between the owner and contractor should address the contractor’s right to control access to the worksite during the project. Additionally, if the contractor intends that its subcontractors be primarily responsible for dealing with any pickets targeting the subcontractor’s work, the contractor should delegate to the subcontractors a non-exclusive right to regulate and control access to the project, subject to the Contractor’s veto.

## CONCLUSION

Labor disputes are a fact of construction industry life. Not even the most optimistic labor lawyer would suggest that there is a way to insure that such disputes will not arise. But with careful planning, it is possible to avoid some disputes altogether, minimize the impact of others and allocate the risks and responsibilities of dealing with those that remain.

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<sup>1</sup> A useful primer on labor relations law in the construction context can be found at 5 STEVEN G. M. STEIN, CONSTRUCTION LAW, ch. 19 (2007); *see also*, 2 THE DEVELOPING LABOR LAW, chs. 19, 22 (5<sup>th</sup> Ed., 2006)

<sup>2</sup> A Project Labor Agreement (PLA) generally requires all contractors working on a project to enter into a labor agreement with one or more unions as a condition of being engaged to work on the job. Such PLA's may also impose other requirements, such as submission of certified payrolls, on signatory contractors.

<sup>3</sup> *See, e.g., NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951)

<sup>4</sup> *Electrical Workers (IUE) Local 761 v. NLRB (General Electric Co.)*, 667 U.S. 367 (1961)

<sup>5</sup> *See, e.g., Ironworkers Local 433 v. NLRB (Robert E McKee, Inc.)*, 598 F.2d 1154 (9<sup>th</sup> Cir. 1979)

<sup>6</sup> *Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950)

<sup>7</sup> *Building & Construction Trades Council (Markwell & Hartz, Inc.)* 155 NLRB 319 (1965), *enf'd*, 387 F. 2d 79 (5<sup>th</sup> Cir. 1967), *cert. den.*, 391 U.S. 914 (1968)

<sup>8</sup> *Electrical Workers (IBEW) Local 211 (Atlantic County Improvement Auth.)*, 277 NLRB 1041 (1985)

<sup>9</sup> *Carpenters Local 1622 (Robert Wood & Assoc.)*, 262 NLRB 1211 (1982), *enf'd* 786 F.2d 903 (9<sup>th</sup> Cir. 1986)

<sup>10</sup> *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)

<sup>11</sup> *See, e.g., Big Y Foods*, 315 NLRB 1083 (1994)

<sup>12</sup> *See, e.g., Wild Oats Market*, 336 NLRB 179 (2001); *Indio Grocery Outlet*, 323 NLRB 1138 (1997), *enf'd* 187 F. 3d 1080 (9<sup>th</sup> Cir. 1999), *cert. den.*, 529 U.S. 1098 (2000)

<sup>13</sup> *See, e.g., Teamsters Local 83 (Allied Concrete)*, 231 NLRB 1097 (1977), *rev'd* 607 F. 2d 827 (9<sup>th</sup> Cir. 1979)

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<sup>14</sup> See, e.g., *AIA 201-1997 General Conditions of the Contract for Construction* (American Institute of Architects, 1997)

<sup>15</sup> 2 STEVEN G. M. STEIN, *CONSTRUCTION LAW*, ¶6.09[1] (2007)

<sup>16</sup> *AIA 201-1997 General Conditions of the Contract for Construction*, *supra*, ¶8.3.1

<sup>17</sup> See, e.g., JAMES ACRET & ANNETTE D. PERROCHET, *CONSTRUCTION INDUSTRY FORMBOOK*, §1.26, ¶44 (3d Ed. 2007); WERNER SABO, *LEGAL GUIDE TO AIA DOCUMENTS*, §5.12, ¶3.4.2 (1998)

<sup>18</sup> *ConsensusDOCS 200, Standard Agreement and General Conditions Between Owner and Contractor* ¶6.3.1, (ConsensusDOCS LLC 2007); JAMES ACRET & ANNETTE D. PERROCHET, *CONSTRUCTION INDUSTRY FORMBOOK supra*, §1.26, ¶43

<sup>19</sup> JAMES ACRET & ANNETTE D. PERROCHET, *CONSTRUCTION INDUSTRY FORMBOOK supra*, §1.26, ¶38

<sup>20</sup> *AIA 201-1997 General Conditions of the Contract for Construction*, *supra*, ¶14.2.2

<sup>21</sup> JAMES ACRET & ANNETTE D. PERROCHET, *CONSTRUCTION INDUSTRY FORMBOOK supra*, §6.8, ¶30

<sup>22</sup> *Id.*, §6.6, ¶80

<sup>23</sup> *Id.*, §6.6, ¶30

<sup>24</sup> *Id.*, §6.6, ¶78

<sup>25</sup> *Cf.* §6.6, ¶80(c)

\*\*\*\*\* STOP! READ THIS \*\*\*\*\*

**GATE A**

STOP! THIS **GATE 'A'** IS FOR THE EXCLUSIVE USE OF EMPLOYEES, CUSTOMERS, SUPPLIERS AND PERSONS DOING BUSINESS WITH:

**“NEUTRAL CO. 1,”**

**“NEUTRAL SUBCONTRACTOR CO. 2,”**

**“NEUTRAL SUBCONTRACTOR CO. 3,”**

**ETC,**

**ETC.**

**“PRIMARY CO.”** EMPLOYEES, CUSTOMERS AND SUPPLIERS, AND THOSE DOING BUSINESS WITH IT **MUST NOT** USE THIS GATE, AND MUST USE **GATE B**, LOCATED AT \_\_\_\_.

\*\*\*\*\* STOP! READ THIS \*\*\*\*\*

**GATE B**

STOP! THIS **GATE 'B'** IS FOR THE USE OF EMPLOYEES, SUPPLIERS AND PERSONS DOING BUSINESS WITH:

**“PRIMARY CO.”**

**“NEUTRAL CO.”** EMPLOYEES, CUSTOMERS AND SUPPLIERS AND EMPLOYEES OF ALL OTHER CONTRACTORS, THEIR SUPPLIERS, AND THOSE DOING BUSINESS WITH THEM MUST USE **GATE A**, LOCATED AT \_\_\_\_.

**CONSTRUCTION WORKSITE LABOR PROBLEMS**

**Part 2 – Administering the Cure**

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## **I. Different Remedies for Different Problems – The Importance of Proper Classification of the Dispute**

To effectively manage and control picketing on the job-site, it is necessary to understand the legal framework regarding permissible and impermissible picketing under the Act. By accurately differentiating one type of picketing from another and applying the appropriate analysis, companies can devise the most effective strategies and solutions to minimize the disruptiveness of the picketing at issue. This section, in addition to touching on the difference between primary and secondary activity, will detail the most common forms of picketing encountered on the job-site – recognitional, area standards, jurisdictional, informational, and unfair labor practices picketing.

### **A. Primary Versus Secondary Activity**

Regardless of the type of picketing, a critical issue in the legal analysis is whether picketing is primary or secondary activity. Generally speaking, union activity such as picketing is considered legal if it is found to be primary activity, and illegal if it is found to be secondary. To better understand this issue, however, it is important to understand the distinction between the primary employer and neutral employers. In the construction context, picketing often occurs where a union has a labor dispute with a subcontractor. That subcontractor would be the “primary employer,” and the other contractors would be “neutral employers.” While the specific tests will be discussed below, Section 8(b)(4) of the Act generally proscribes picketing that unnecessarily involves neutral employers and their employees in labor disputes between a union and the primary employer.

### **B. Recognitional and Area Standards Picketing**

Recognitional picketing is designed to force an employer to recognize a union as the representative of a group of employees on the construction site. Area standards picketing is designed to force an employer to pay commensurate wages and fringe benefits to those paid in the local community. In the construction setting, area standards picketing is typically intended to advise employees of neutral employers that the primary employer does not meet area wages and conditions.

Both types of picketing are permissible, as long as they conform to certain requirements imposed by the Act, the Board and the courts.

*1. Limitations on Recognitional Picketing*

The Act places specific limitations on a union's ability to engage in recognitional picketing. For example, under Section 8(b)(7)(A) of the Act, it is illegal to engage in recognitional picketing if the employees at issue are already represented by another union. Section 8(b)(7)(B) proscribes recognitional picketing if there has been an NLRB election within the previous twelve (12) months of the picketing. If the picketing seeks recognition in either situation, the union is committing an unfair labor practice and can be forced to stop its picketing.

If neither of the above situations apply, recognitional picketing is legal, but pursuant to Section 8(b)(7)(C), such picketing must not continue beyond a "reasonable period of time" "not to exceed 30 days" without the filing of a representation petition. If the union does file a representation petition with the NLRB, it may continue recognitional picketing until the Board conducts an election.

*2. Limitations on Area Standards Picketing*

Picketing to inform employees and the public that an employer does not pay area standards in terms of wages and fringe benefits is protected by the Board and the courts as a legitimate union activity. *C.A. Blinne Constr. Co. (II)*, 135 NLRB 115 (1962). Area standards picketing is not viewed as having a bargaining, recognitional, or organizational object, and therefore there is no limitation on the amount of time that area standards picketing is allowable. However, claims of area standards picketing are carefully scrutinized. The permitted message in area standards picketing is fairly narrow, and any attempt by the union to engage in other forms of picketing to put pressure on a neutral employer, under the guise of area standards picketing, can be prohibited as detailed in the sections below. Area standards picketing will generally be lawful if the union exhibits knowledge of

the primary employer's proffered wages and benefits, and if there is nothing in the union's signs, words, or conduct that demonstrates a bargaining, recognitional or organizational intent.

However, if the picket signs, union statements, or union conduct demonstrate an object that is broader than area pay and benefits, the picketing can be deemed to be unlawful. Therefore, it is important to be fully aware of the content of the picket signs and union communication to determine if there is an unlawful object to the picketing. In addition, union claims of area standards picketing can be undermined if the union has not inquired into the employer's wage scale and benefits, or if the primary employer actually pays area wages and benefits. These factors are integral to the Board and courts' analysis of whether the union is really engaged in protected area standards picketing.

### **C. Jurisdictional Picketing**

Jurisdictional picketing is picketing by a union in support of its claim that certain work (performed by either non-union employees or members of another union) should instead be performed by its members. This type of picketing is illegal and constitutes an unfair labor practice, as is picketing by a union to force a contractor to assign the work at issue to union members – as will be discussed in more detail later in this article.

### **D. Informational Picketing**

Informational picketing involves the disclosure of information to the public that a primary employer does not employ members of a union or does not have a contract with a union. Informational picketing is permitted as an exception to the Act's restrictions on recognitional picketing. Specifically, Section 8(b)(7)(C) of the Act permits unrecognized unions to engage in picketing or other publicity "for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of the picketing is to induce any individual employed by any other person in the course of

his employment, not to pick up, deliver or transport any goods or not to perform any services.” What qualifies as informational picketing is narrowly construed.

In order to qualify as informational, the picketing must meet three criteria. First, the picketing must appeal to the public. For example, where picketing signs state that an employer does not employ members of or have a contract with a labor union and those signs are displayed only at the public entrances to the employer’s premises, there is a greater likelihood that the picketing will be viewed as informational picketing appealing to the public. Second, picket signs must be truthful regarding the information presented. Third, informational picketing cannot induce employees of neutral employers to refuse to deliver, pick up or transport goods or refuse to perform any services. For example, if picketing causes interruptions in deliveries to a primary employer, causes suppliers to stop sending personnel to the premises, or even if it causes the primary employer to modify its methods of doing business with suppliers whose products are essential to daily operations, it is not informational picketing and it may violate the Act.<sup>1</sup> Notably, not all interruptions to business will result in a violation of the Act.<sup>2</sup> The greater the impact of the interruption, the less likely picketing will be considered as informational picketing.

*1. Limitations on Informational Picketing*

Informational picketing may continue indefinitely as long as it does not cause employees of any other employer to stop work or fail to pick up or deliver goods to the picketing premises. Also, picketing that is accompanied by numerous acts of violence or harassment does not constitute informational picketing.<sup>3</sup> Finally, if evidence, such as conduct by the union members before and during the picketing indicates that the picketing is really seeking union recognition, then the picketing may violate the Act.<sup>4</sup>

## 2. *Responding to Informational Picketing*

When picketing begins, employers should try to ascertain what type of picketing it is. The employer should observe what the signs used for the picketing say. Furthermore, the employer should take note whether picketing occurs near public entrances or other areas. Third, the employer should figure out how, if at all, the picketing is affecting its ability to receive deliveries and otherwise conduct its business after the picketing begins. If picketing is not informational picketing, then it may constitute any of the other types of picketing discussed in this article. Furthermore, while a violation of the informational picketing provisions of the Act constitutes an unfair labor practice, the picketing may also violate other provisions of the Act.

### **E. Unfair Labor Practice (“ULP”) Picketing**

From time to time, the union or a group of employees may begin picketing in order to protest an unfair labor practice by the employer. Such picketing is not prohibited by the Act and may continue indefinitely against primary employers. Nevertheless, picketing that affects secondary employers may be subject to the same limitations previously discussed regarding consumer boycotts and types of picketing.

In summary, the unfair labor practices that may give rise to picketing, as outlined by Section 8(a) of the Act, may include the following:

1. Interference with an employee’s exercise of his or her rights under Section 7 of the Act;<sup>5</sup>
2. Dominating or interfering with the formation of a labor union;
3. Discriminating with regard to higher tenure or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor union;
4. Discharging or otherwise discriminating against an employee because he has filed charges or given testimony in an NLRB proceeding; and
5. Refusing to bargain collectively with representatives of employees.

The primary issue that arises when an employee begins ULP picketing against an employer is whether the union is truly protesting or picketing because of an unfair labor practice or whether it

has some other objective. For example, when an unorganized union begins protesting a ULP related to an employer's refusal to bargain, it is difficult to determine whether picketing is really based on ULP or seeking recognition of the union.

In *Intl. Hod Carriers Bldg., Etc., (C.A. Blinne Constr. Co.)*, 135 NLRB 1153 (1962), an employer and union were in a dispute because the employer threatened to, and did, transfer an employee out of a particular location so that he could not vote and assist in forming a majority in an upcoming election to establish the union as the bargaining representative of employees. Thereafter, the union began picketing the employer. The picketing was protesting unfair labor practices--refusal to recognize the union and the transfer of an employee in order to hinder the union's ability to represent the employees. The picketing also lasted for a period longer than 30 days, which is the maximum amount of time that recognitional picketing is permitted to continue. After that period, the employer filed an unfair labor practice charge with the NLRB alleging unfair labor practices related to failure to recognize the union and discrimination against the employee. The NLRB determined that the picketing violated the Act because it had a recognitional object and it exceeded the amount of time allowed for recognitional picketing. The Board also noted that the unfair labor practices charges were not filed until after the proscribed period for recognitional picketing had ended, thus severely weakening the union's claim that the picketing was related solely to the ULP.

As with other types of picketing, employers should examine the reasons provided for the picketing and other reasons that may be apparent from the circumstances surrounding it. It is also critical to determine whether the union has filed an NLRB charge alleging ULP violations (described above), as it may be critical to a claim that the object of picketing relates to the ULP charges. Further, employers should consider the impact of picketing on secondary employers.

## **F. Consumer Boycotts, Handbilling and Other Publicity, and Bannering**

Consumer boycotts, handbilling and bannering, if peaceful, are, for the most part, lawful under the Act. Specifically, consumer boycotts are often accomplished by picketing. Peaceful consumer boycotts/picketing against primary employers are not violations of the Act, unless they cause a complete or near-complete boycott of neutral, secondary employers who are not involved in the labor dispute. Handbilling refers to giving out pamphlets or other written materials to consumers urging them not to patronize primary or secondary employers. Again, peaceful, non-threatening and non-coercive handbilling and other publicity to consumers are broadly permitted under the NLRA against both primary and secondary employers. Handbilling and other publicity against secondary employers, however, may violate the Act when combined with unlawful picketing, violence, or threats, or when it induces the employees of secondary employers not to come to work, or when it causes their suppliers to refuse delivery or pick up. Like handbilling, bannering is a union tactic that is sometimes used to pressure neutral employers by displaying a large banner in front of the employer's facility or the construction site. Bannering has sometimes been considered to be unlawful picketing in violation of the Act while at other times, courts have denied injunctions preventing bannering by the union as a non-coercive form of free speech.

When a consumer boycott results in a boycott of all of a secondary employer's products or services, when consumer boycotts, handbilling (or other publicity) or bannering induce the secondary employer's employees to strike or suppliers to stop delivering or picking up goods, or when the boycotts, handbilling, or bannering appear violent, coercive or threatening, an employer may file an unfair labor practice claim with the NLRB, seek to stop the activity with an injunction, and/or seek damages for the unfair labor practice.

## **II. Secondary Picketing**

Regardless of the type of picketing at issue, picketing that is deemed to have a “secondary object” – i.e., picketing that unnecessarily involves neutral employers in a labor dispute, violates Section 8(b)(4) of the Act. The legal framework that is applied to the primary/secondary analysis is provided below, as are the permissible methods of limiting the impact of lawful picketing on a construction site, such as a reserved gate system. In addition, this section provides the available remedies for unlawful picketing, including unfair labor practice proceedings, NLRB injunctions, and damages under Section 303 of the Act.

### **A. Determining Whether the Picketing is Unlawful Secondary Activity**

While it is an inexact science, the primary/secondary distinction is a mechanism to help balance the congressional objectives of “preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.” *NLRB v. Building & Constr. Trades Counsel*, 341 U.S. 675, 692, 28 LRRM 2108 (1951). The primary/secondary activity analysis differs depending on whether the picketing occurs at the primary employer’s facility, or whether it occurs at a construction site owned by a neutral employer. Both analyses are provided below.

#### *1. Picketing at the Facility of the Employer Involved in the Labor Dispute*

Section 8(b)(4) of the Act precludes certain conduct where the union’s object is to involve neutral employers in a dispute between the union and another employer. Where the picketing occurs at the premises of the employer involved in the labor dispute – known as the “primary employer” – the Board and the courts will focus on whether the neutral employer’s work was “unconnected to the normal operations of the [primary] employer.” *Electrical Workers (IUE) Local 761 v. NLRB (General Electric)*, 366 U.S. 667, 48 LRRM 2210 (1961). In the *General Electric* case, G.E. used subcontractors to perform maintenance work at its large manufacturing facility, including retooling

for the facility in preparation for a new line of appliances, and for general maintenance work. G.E.'s unionized employees, in conjunction with their strike against G.E., picketed the entrance used only by the neutral construction subcontractors, whose employees refused to cross the picket lines. The Board ruled that the union's object in picketing the subcontractors' entrance was to force the subcontractors to stop doing business with G.E., in violation of Section 8(b)(4)(A) of the Act. The Supreme Court reversed and remanded the case to the Board to determine if the subcontractors' work was "related" to G.E.'s normal operations. Because the Board found that the work was related to normal operations, the picketing did not violate the Act.

As the United States Supreme Court summarized a few years later, the legality of picketing at a gate only used by employees of a neutral employer depends upon:

the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the employer's plant, the picketing was an unfair labor practice.

*Steelworkers v. NLRB (Carrier Corp.)*, 376 U.S. 492, 55 LRRM 2698 (1964).

In this way, a union may legally direct its appeal to neutral employees whose work is related to the primary employer's normal operations. However, it is often the case that construction work performed at a primary employer's facility is unconnected to the facility's normal operations. *See generally General Electric*, 366 U.S. 667 (1961) (picketing may be barred when the subcontractors perform "tasks unconnected to the normal operations of the struck employers – usually construction work on his buildings.")

## 2. *Picketing at a Construction Project*

The legal analysis for picketing at a construction site is different, because construction sites are referred to as a "common situs" – a site on which two or more employers are engaged in normal business operations, or an "ambulatory situs" – a temporary work location used by the primary

employer. In these situations, the union must attempt to minimize its impact on the neutral employees to protect “unoffending employers.” The analysis for picketing at a construction site focuses on the manner in which the picketing is conducted. In these situations, the Board has stated that picketing the premises of a secondary employer is primary activity (and therefore lawful) only if it meets the following conditions:

- (1) the picketing is strictly limited to times when the *situs* of a dispute is located on the secondary employer’s premises;
- (2) at the time of the picketing the primary employer is engaged in its normal business at the *situs*;
- (3) the picketing is limited to places reasonably close to the location of the *situs*; and
- (4) the picketing discloses clearly that the dispute is with the primary employer.

*Moore Dry Dock Co.*, 92 NLRB 547, 27 LRRM 1108 (1950). In *Moore Dry Dock*, the union picketed the dry dock where the primary employer’s ship was temporarily maintained. The ship’s crew was on board conducting training and preparing for future deployment. The union could not picket alongside the ship, so it picketed the entrance to the neutral dry dock owner’s site. The Board found the picketing to be lawful, and set forth the standards listed above.

Notably, pursuant to the first and second factors, the picketing must be limited to times when the primary employer is on site and is engaged in its normal business operations. However, the union may satisfy these factors when it has no knowledge of the primary employer’s work schedule, or if the union is misled regarding the times when the primary employer would be present. *Montgomery Ward & Co.*, 194 NLRB 1144 (1972); *Myers Plumbing Co.*, 146 NLRB 888 (1964).

Where the union complies with these standards, the picketing is presumed to be lawful primary activity, and where it does not, the picketing is presumed to be unlawful secondary activity. If the union is in compliance, the employer has the burden to bring forth other evidence (union

statements, conduct, etc.) establishing that the union's picketing was done pursuant to an unlawful objective.

The Board has also ruled that a union may not lawfully picket suppliers that provide support services such as food and sanitation services to the primary employer on a construction site. *Chris Crane Co.*, 294 NLRB 182 (1989). A union can only picket suppliers who bring supplies to the primary employer that are used in its primary course of business.

#### **B. Using Reserve Gates to Isolate Secondary Labor Disputes**

The most effective tool that a property owner or general contractor has to limit the impact of lawful picketing is to implement a reserved gate system. Under this approach, a "reserved gate" is set up for the primary employer (the employer with whom the union has a dispute) and a "neutral gate" is set up for the employees of other contractors, suppliers or vendors. Employees, suppliers and visitors of the primary employer must only be allowed to enter the site through the reserved gate, while everyone else must enter through the neutral gate. A properly implemented reserve gate system will confine the union's lawful picketing activity to the established reserve gate. Without a reserved gate system, the union is free to picket the entire job site.

Reserved gates and neutral gates should be clearly marked with signs indicating who should and should not enter and exit the facility through them. Examples of appropriate signs are found in the appendix to this document. Once these gates have been established and marked, the property owner or general contractor must ensure that the neutral gate does not become contaminated. An established neutral gate becomes contaminated when an employee, supplier or visitor of the primary employer passes through the neutral gate, unless the contamination is isolated or de minimus. *Hensel Phelps Constr. Co.*, 284 NLRB 246 (1987). Once a neutral gate becomes contaminated, the union is free to picket the contaminated neutral gate until the neutral gate is "reestablished" through

corrective measures such as re-issuance of notice and signs. *Robbins Plumbing & Heating*, 261 NLRB 482 (1982).

In addition, the reserved gate must not be hidden from public view or practically inaccessible. For example, the Board and courts have found reserved gate systems invalid where the neutral gate is at the main public entry to the project and the reserved gate is tucked in an alleyway and not visible to the public. *See Southern Sun Elec. Corp.*, 237 NLRB 829 (1978). *See also Electrical Workers (IBEW) Local 501 v. NLRB*, 756 F.2d 888 (D.C. Cir. 1985). The Board, however, has not required that the primary gate maximize the union's visibility. *Herring & Worley, Inc.*, 282 NLRB 100 (1986) (finding union violated Section 8(b)(4)(B) by ignoring reserved gate that would not have been "invisible" to the public).

It is important to note that lawful picketing can also be contained by altering the work schedule of the primary employer. Under this approach, the primary employer is scheduled to work at times when other contractors are not present. Because lawful picketing can only occur at times when the primary employer is present, the picketing would not interfere with any neutral employees. While this approach may create logistical problems, it can be particularly useful in the event that setting up reserved gates is impractical.

### **C. Remediating Unfair Labor Practices/NLRB Injunctions**

In situations where the union is engaging in unlawful picketing, the affected employer can seek to have the picketing stopped by filing an unfair labor practice charge ("ULP") against the union with the NLRB. While picketing is considered a protected activity under Section 7 of the Act, the Act also specifies a number of unfair labor practices that are applicable to certain picketing activities: Section 8(b)(1)(A) prohibits picketing used to coerce other employees; Section 8(b)(4) renders unlawful a union's attempt to place improper secondary pressure upon a neutral employer; and Section 8(b)(7) proscribes, under certain circumstances, attempts to force recognition of a union.

In the event that the union's picketing activities violates one of these prohibitions, the employer may file a ULP at the appropriate NLRB regional office, specifying the illegal activity.

While the Board is adjudicating the ULP charge, the employer may also request an injunction under Section 10(l) of the Act. The employer cannot file a 10(l) injunction directly; rather, the employer must petition the Board to file for an injunction against the union in federal district court, pending the resolution of the underlying ULP charge. Under Section 10(l) of the Act, the NLRB Regional Director must seek injunctive relief if there is "reasonable cause to believe" that the union is engaging in unlawful picketing. Once the NLRB files for an injunction, the federal district court has jurisdiction to enter a temporary restraining order or a preliminary injunction against the offending union until the Board rules on the pending ULP.

In addition, if the employer has a collective bargaining agreement with the union engaging in or acquiescing to unlawful activities, the agreement may have provisions proscribing such conduct. The employer can use these provisions to bring an arbitration against the union, and in cases with particularly egregious facts, the employer can also bring an action in federal district court to seek an injunction pending the arbitrator's ruling.

#### **D. Use of Federal Courts Under Section 303**

While successful ULP charges typically result in a cease and desist order from the Board, an employer who has suffered actual damages as a result of a union's unlawful secondary activities under Section 8(b)(4) of the Act may also seek damages under Section 303 of the Act. Unions have been exposed to liability under Section 303 for activities such as interrupting the operations of a neutral employer to further a primary strike, and picketing at an established neutral gate. Generally, Section 303 actions require a causal connection between the union's unlawful actions and the injury suffered by the employer. In addition, a union will typically not be liable for the acts of individual members unless the employer can show that the union leadership participated in, ratified, instigated,

encouraged, condoned, or directed the illegal acts of its members. Courts will award compensatory damages where the damages are not speculative and are proximately caused by the union's illegal actions.

### **III. Violent or Trespassory Picketing**

While picketing – in and of itself – is a matter of federal law, other union actions that transcend peaceful picketing often are proscribed by state law. For example, state law governs conduct such as trespassing on company property, engaging in violence, threatening violence, or engaging in intimidating behavior. The issue then becomes to what extent does the Act preempt state law regarding these actions.

#### **A. Trespassing on Private Property**

As discussed above, while picketing is generally a protected activity under Section 7 of the Act, picketing is prohibited in certain situations under Section 8. The Supreme Court has determined that the NLRB has primary jurisdiction, and therefore a matter is preempted, if it involves conduct *arguably* prohibited or protected by the Act. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). As a result, because trespassory picketing can come within the ambit of Section 7's protection of employee rights, state trespass laws are generally pre-empted. *MBI Acquisition Corp.*, 324 NLRB 1246 (1997).

The Supreme Court provided an exception to this general rule, however, where the union does not file a ULP to enforce its Section 7 rights. *Sears, Roebuck & Co. v. Carpenters Dist. Council*, 436 U.S. 180, 98 LRRM 2282 (1978). Because a company cannot affirmatively assert the issue of Section 7 protection, the company's only recourse (where the picketing does not violate the Act) is to bring a state court action. As a result, where the union has not placed the Section 7 protection issue before the Board through an unfair labor practice charge, in some circumstances, the state law action will not be preempted. *Sears, Roebuck & Co. v. Carpenters Dist. Council*, 436 U.S.

180, 98 LRRM 2282 (1978). This exception is much more likely to be applied in cases of non-employee trespass, because such activity is less frequently protected by Section 7 of the Act.<sup>6</sup>

It is important to note, however, that a union may have the right to picket on company property if the company regularly grants access to other organizations or groups.

**B. State Law Actions Alleging Violence, Threats of Violence, and Intimidation are Not Preempted by the Act**

Union activity involving violence, threats of violence, or intimidation could either violate Section 8(b)(1)(A) of the Act, or it could be protected by Section 7 of the Act. Based on the *Garmon* preemption doctrine outlined above, it would seem that state court actions regarding such activity would be preempted, because of the arguably protected or prohibited nature of the conduct under the Act. However, the Supreme Court has allowed state courts to regulate such conduct as a result of “the compelling state interest . . . in the maintenance of domestic peace . . . .” *Garmon*, 359 U.S. 236, 247 (1959). The jurisdiction of state courts to enjoin mass picketing, the blocking of entrances and exits, acts of violence, intimidation, and threats of violence is a well recognized exception to the doctrine of federal preemption. *Garmon*, 359 U.S. 236 (1959). The Supreme Court has recognized that such actions are governed by state law because they are based upon rights granted by local laws which are designed to preserve the public peace. Thus, picketing that results in obstruction of streets or plant entrances, or that involves intimidation, violence, and threats of violence, may be enjoined by a state court.

It is important to be prepared to file a state court injunction in case mass picketing results in the blockage of entrances and exits to the construction site, or in case there is picket line intimidation, violence or threats thereof. The standards for attaining such an injunction vary according to state law, as do the pleading and motion requirements. State law filing requirements may include motions, supporting memoranda, affidavits regarding the illegal activities, and bond requirements. It is prudent to understand these requirements and have documentation prepared in

advance, and to have some evidentiary record of the activities sought to be enjoined – such as photographs of the blockage of entrances, or contemporaneous factual accounts of intimidation, violence, or threats of violence from an eye-witness.

#### **IV. Jurisdictional Disputes For Failing to Man Job**

##### **A. What Is A Jurisdictional Dispute?**

On a construction site, jurisdictional disputes occur where a union contends that a work assignment was incorrectly given to another union or where a union claims that the contractor/employer assigned work to the wrong class of unionized workers. If a jurisdictional issue arises, a union generally has no right to protest the assignment by striking, boycotting, picketing or threatening to engage in such conduct about the issue – as doing so is an unfair labor practice in violation of the National Labor Relations Act (“NLRA” or the “Act”).<sup>7</sup> Similarly, a threat by a union to shut down the job until work is re-assigned is also an unfair labor practice in violation of the Act. Accordingly, when faced with on-site picketing or a strike, employers should determine whether the issue about which the union is striking/picketing is a jurisdictional one.

In light of the Act’s provisions regarding jurisdictional disputes, it is important to keep in mind that this prohibition does not apply where striking/picketing involves a lawful dispute with a primary employer (the employer with whom the union is actually having a dispute) concerning issues such as area standards, informational, work preservation or certain contract violations.<sup>8</sup> This prohibition also does not apply when an employer is failing or refuses to conform with a prior NLRB order or certification awarding the contested work to the complaining union. Because of these exclusions, unions may, at times, claim that striking, picketing, or boycotting is only motivated by lawful purposes, and not jurisdictional ones. Nevertheless, where a union’s efforts to take actions on lawful grounds are combined with a jurisdictional dispute, the union’s actions still may violate the Act. As such, it is important for employers to be cognizant of, and document, the conduct that occurs

before and after disputes arise in order to determine whether the issues in dispute may be jurisdictional.

Notably, however, although picketing, striking or boycotting over a jurisdictional issue violates the Act, a union does not violate the Act when it pursues a contractual remedy through arbitration or it seeks, if available, judicial action in federal court regarding jurisdictional disputes. Furthermore, threats of filing a lawsuit or seeking arbitration are not violations of the Act.

## **B. Resolving Jurisdictional Disputes**

Once an employer realizes that a union may be striking, picketing or threatening to strike or picket due to a jurisdictional issue, it has the right to bring its claim before the NLRB for resolution. Indeed, Section 10(k) of the Act, which applies only to unfair labor practices related to jurisdictional disputes, gives the NLRB the exclusive right to conduct hearings to determine whether a jurisdictional dispute between the unions or crafts exists and/or violates the NLRA. The Act states, in relevant part, as follows:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of (4)(D) of Section 8(b), . . . . [t]he Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen unless, within ten days after notice that such a charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon voluntary adjustment of the dispute, such charge shall be dismissed.

As a practical matter, however, in attempting to manage threatened or actual picketing, boycotting or striking as a result of a jurisdictional dispute, an employer may contact the business agents of the unions involved so that the unions can work out the matter between themselves. If the unions are able to reach an agreement, the employer should obtain a written statement from the union relinquishing the work and, unequivocally stating that it has voluntarily done so, and disclaiming its right to perform the work. Although such a statement may still help resolve the issue before and after a charge has been filed, the NLRB is not required to accept such a statement,

sometimes called a disclaimer statement, and when it does so, it may examine the credibility of the statement in light of facts and circumstances of the dispute.<sup>9</sup> That is, if the union is disclaiming work, but its actions indicate that it is still trying to force an employer to assign the work, such a disclaimer will likely be invalid.<sup>10</sup> If the unions are not able to come to a resolution themselves, then the employer may file an unfair labor practice charge with the NLRB over the unlawful action (striking or picketing regarding a jurisdictional matter).

Once an employer has filed a charge with the NLRB, the charge can be resolved in two ways. First, the charge can be resolved by voluntary adjustment, where the parties agree to resolve the dispute through binding arbitration or another similar means (or one party disclaims a right to work). Second, if the method of voluntary adjustment cannot be agreed to within ten days of the filing of an NLRB charge, then the dispute will be resolved by the NLRB.

For a voluntary method of adjustment to be considered valid, it must bind all parties to the dispute regarding the assignment of work, including the employer. For example, in *Operating Engineers' Local 318 (Foeste Masonry)*, 322 NLRB 709 (1996), an employer entered into a collective bargaining agreement (“CBA”) with a union regarding certain work and it also subsequently entered a project agreement (an agreement related to the terms and conditions of employment for a particular project) with another. Both the CBA and the project agreement contained provisions concerning voluntary adjustment for resolving jurisdictional disputes and each established a different method for resolving the dispute. The Board held that no voluntary adjustment agreement could exist where an employer was bound by two different agreements with conflicting methods of dispute resolution.

As the discussion above makes clear, whatever method is used by the parties to determine the proper assignment of work must be binding and agreed to by all parties affected.<sup>11</sup>

Importantly, voluntary methods of adjustment may be agreed upon on a case-by-case basis, or they may be determined in advance by addressing these concerns in the provisions of a CBA or project agreement. As such, not only should employers be aware of these potential issues as they review and negotiate CBAs or project agreements, they should also consult with their labor attorney(s) concerning the pro's and con's of particular methods of adjustment as compared with each other and with having a 10(k) hearing before the NLRB. Also, when jurisdictional issues arise, employers should review relevant agreements to determine what, if any, methods of voluntary adjustment already are part of those agreements.<sup>12</sup>

## **V. Refusal to Handle Goods – Hot Cargo – Section 8(e) of the Act**

### **A. General**

It is an unfair labor practice under Section 8(e) of the Act to enter into a “hot cargo” agreement. A “hot cargo” agreement is one where an employer agrees to boycott use of, or dealing in, products or services of another employer or to stop doing business with another person. Specifically, Section 8(e) states that: “[i]t shall be an unfair labor practice for any labor organization and any employer to enter into **any contract or agreement, express or implied, whereby any employer ceases, refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and in any contract or agreement entered into hereto or hereafter containing such an agreement shall be to such an extent unenforceable and void.**” (emphasis added).

This issue becomes important to employers in the construction industry because they may, due to the temporary nature of jobs in that industry and the method by which the Act permits union representation in the construction industry<sup>13</sup>, enter into collective bargaining agreements or project agreements without engaging in long and extensive contract negotiations. Also, because the Act

specifically provides that, in the construction industry, subcontracting provisions requiring an employer to use union subcontractors do not violate the “hot cargo” prohibitions of Section 8(e) of the Act, it is important for employers to consider these and related issues in reviewing and understanding their obligations under collective bargaining agreements and project agreements. Moreover, to the extent that efforts to enforce and/or enter such agreements may constitute unfair labor practices, employers should be mindful of these concerns—to avoid violating the Act themselves and to recognize when they are entitled to file a charge with the NLRB regarding actions taken by a union which violate the “hot cargo” provisions of the Act.

**B. Construction Proviso of Section 8(e): Subcontracting Exception for Construction Industry.**

Although a provision preventing a contractor from hiring a non-union subcontractor violates the hot cargo provisions of the NLRA in non-construction settings, this restriction does not apply to on-site work in the construction industry. Specifically, the “hot cargo” prohibition does not apply to “an employer in the construction industry relating to the **contracting or subcontracting of work to be done at the site of construction, alteration, painting or repair of a building, a structure or other work.**” (emphasis added)<sup>14</sup> The purpose of the provision was to eliminate the friction between union and nonunion employees at job sites. Consistent with that purpose, this construction industry exception to the prohibition against “hot cargo” agreements means, among other things, that contractors and unions may lawfully agree that contractors and subcontractors hired by an employer must be part of a union in order to be eligible for hiring. *Woelke and Romero Framing v. NLRB*, 456 U.S. 645 (1982).

Notably, even under the construction proviso, unions may not use striking, picketing, boycotting, or other economic pressure to enforce subcontracting clauses, because those actions constitute coercion in violation of the Act.<sup>15</sup> Furthermore, subcontracting agreements that state that employees may strike to enforce an agreement are not protected by the construction proviso and

therefore violate the Act.<sup>16</sup> To enforce subcontracting agreements, a union's only options are to file a lawsuit or seek arbitration.<sup>17</sup> In the event that a union is striking or boycotting to enforce a subcontracting clause, an employer should consider filing a charge with the NLRB, seeking an injunction through the NLRB, and if an unfair labor violation is found, consider seeking damages caused by the boycott.<sup>18</sup> If there is no strike or picketing, then the employer may still consider either filing a charge with the NLRB or taking the issue to arbitration.

### **Conclusion**

As noted previously, labor disputes are a fact of life in the construction industry. Part I of this article presented approaches to avoid these disputes in advance. But even with careful planning, construction employees may be caught up in a labor dispute, oftentimes one not of their making. But as seen in Part II, there are numerous approaches a construction employer can take to end, or at least mitigate, the effects of the dispute.

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<sup>1</sup> See, e.g., *Hotel & Restaurant Employees Local 500* (Hunt’s Rest.), 138 NLRB 470 (1962).

<sup>2</sup> *Building & Constr. Trades Council (Houston) (Claude Everett Constr. Co.)*, 136 NLRB 321 (1962).

<sup>3</sup> *Fasco v. Building & Constr. Trades Council*, 79 LRRM 2228 (N.D. Ohio 1971).

<sup>4</sup> *Carpenters and Joiners of America, Local 745*, 178 NLRB 684 (1969) (noting that words on picket signs are not the only indicia of whether picketing is informational and concluding that the objective of picketing was recognitional, not informational, where information on signs regarding wages on picket signs was false—due to lack of investigation—and where the union representative wrote multiple letters seeking union recognition before picketing campaign).

<sup>5</sup> Section 7 of the Act states “employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, than to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.”

<sup>6</sup> Trespassory picketing by non-employees is not protected if there is *any* reasonably available alternative means of communicating with the employees. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

<sup>7</sup> The provisions of the Act, which deal with those issues, are in Section 8(b)(4)(D) and state, in relevant part:

It shall be an unfair labor practice (i) to **engage in, or induce or encourage** any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to **threaten, coerce, or restrain** any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . **forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to the employees in another labor organization or in another trade, craft, or class**, unless such an employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. (emphasis added)

<sup>8</sup> These issues are discussed previously in this Article. Note that strikes or picketing against a secondary employer (a neutral employer with whom union has no relationship or dispute) related to these issues, as previously discussed, are not generally considered lawful under the Act.

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<sup>9</sup> *Painters Local 1396, (Wolf & Sons Painting Co.)*, 246 NLRB 442 (1979)

<sup>10</sup> *See id.*

<sup>11</sup> Even though the parties involved must provide evidence of the voluntary method they have decided to use to determine whether work has been properly assigned within ten (10) days, they are not actually required to resolve the jurisdictional issues within the ten (10) day period.

<sup>12</sup> Many construction contractor/employers may be, as part of their agreements, subject to provisions requiring that jurisdictional disputes be resolved by joint boards comprised of union and management representatives.

<sup>13</sup> Under Section 8(f) of the Act, construction industry employers are permitted to recognize a union without first establishing, as is normally required, that the majority of its employees approve of union representation before the union will be recognized as a representative of the employees.

<sup>14</sup> *See* Section 8(e) (emphasis added).

<sup>15</sup> *See, e.g., Essex County and Vicinity Council of Carpenters and Millrights v. NLRB*, 332 F.2d 636 (3<sup>rd</sup> Cir. 1964); NLRA Section 8(b)(4)(A) and (B).

<sup>16</sup> *See id.*

<sup>17</sup> *See id.*

<sup>18</sup> Sections 10(l) of the NLRA and 303 of the LMRA.