NLRB Developments and the Impact on Construction: *Picketing and Bannering*

Prepared by:
Ronald J. Passarelli, Esq., Koehler & Passarelli, LLC
John T. Merrell, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

LORMAN®
Published on www.lorman.com - July 2019

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you UNLIMITED access to Lorman's ever-growing library of training resources:

- ☑ **Unlimited Live Webinars** - 120 live webinars added every month
- ☑ **Unlimited OnDemand and MP3 Downloads** - Over 1,500 courses available
- ☑ **Videos -** More than 1300 available
- ☑ **Slide Decks -** More than 2300 available
- ☑ White Papers
- ☑ Reports
- ☑ Articles
- ☑ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.

Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

Recent Developments from the NLRB and the Impact on Construction

February 2019

I. PICKETING AND BANNERING

Picketing of jobsites is a frequent occurrence in the Construction Industry. Each year unions set up hundreds of pickets designed to exert pressure on one or more employers. Most picketing situations in the Construction Industry result from mixing union and non-union subcontractors on the same worksite. Picketing of jobsites often involves a chess game between the general contractor and/or subcontractor and the union. The rules of the game are dictated by the National Labor Relations Act (NLRA).

Section 8(b) of the NLRA defines the types of unfair labor practices by labor organizations that are in violation of the NLRA. Subsection 8(b)(7) states that it is an unfair labor practice for a union:

> to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> > (A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of the Act,
> >
> > (B) where within the preceding twelve months a valid election under section 9(c) of the Act has been conducted, or
> >
> > (C) where such picketing has been conducted without a petition under section 9(c) of the Act being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) of the Act or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any 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 such 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.
>
> Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

While Section 8(b)(7) directly addresses pickets, Section 8(b)(4) of the NLRA may also have an impact. Section 8(b)(4)(i) state that it is an unfair labor practice for a labor organization:

> to engage in, or to 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—
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e);
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
>
> (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

A. WHAT IS A LAWFUL PICKET?

The details of the picket are of prime importance. Among those important details are the primary employer that is the target of the picket, where the picketing takes place, the language of the signs being held by the labor organization, the purpose of the picket, and the conduct of the picket.

There are basically two types of picketing – informational and recognitional. Informational can be for a length of indefinite time. This is often called an "area standards" picket because the labor organization claims that a primary employer is not paying its employees wages and benefits in accordance with "area standards." Usually the labor organization defines "area standards" as being the wages and benefits paid to their members under the area collective bargaining Agreement. Recognitional picketing is when a labor organization pickets in order for the primary employer to recognize the union as the representative of the employer's employees. Recognitional picketing is time-limited (no more than thirty days). If a picket should occur for the maximum time frame of thirty days, the union must file a petition with the NLRB to hold a proper election.

If picketing occurs at the primary site of the employer with whom the union has the dispute (primary or targeted employer), the picketing is presumed to be lawful[1]. However, a primary employer may isolate neutral employers present on the worksite from the effects of that picketing.

Primary employers attempting to isolate neutral employers from union picketing often rely on the standards set forth in *General Electric*.[2] This case arose when employees became upset that the manufacturer of a large plant reserved one of five gates exclusively for employees of independent contractors. The union that represented most of the manufacturer's employees at this plant, called for a strike and picketed all five of the gates on the property. The NLRB originally held that the manufacturer was violation Section 8 of the NLRA by reserving a gate. The Court of Appeals reversed the NLRB's ruling.

If a Union pickets the primary site of an employer, that employer may attempt to isolate neutral employers on the site/limit the secondary effects of picketing at the primary site under fulfilling the standards:

1. Employer must establish and maintain a separate gate for the workers of the secondary employer,
2. The work of the secondary employer must be *unrelated* to the normal operations of the primary employer, and
3. The work done by the secondary employer must be of a kind that would not, in the absence of a labor dispute, require the curtailment of the normal operations of the primary employer.

Another case that looks at picketing, but in the context of picketing occurring at a secondary site, is *Moore Dry Dock*[3]. The Moore Dry Dock Company is in the business of repairing, constructing, and converting ships, steel erection work, and the manufacture and repair of industrial machinery. Its principal place of business is Oakland, California, and it engages in business internationally as well. The Sailors' Union of the Pacific, is a labor organization within the definition of the NLRA. In this case, sailors that were aboard a ship in Moore's harbor for repair, were in a dispute with the owner of the ship. Picketing occurred on the dock, and the Board had to answer whether this conduct was lawful.

The NLRB stated that "Section 8(b)(4)(A) is aimed at secondary boycotts and secondary strike activities. It was not intended to proscribe primary action by a union having a legitimate labor dispute with an employer." *Id.* However, a union has the right to picket a primary employer at a secondary site if the following four conditions are present:

1. The picketing is limited to times when the situs of the dispute is located on the secondary employer's property (No picketing if primary employer is not present on site),

[1] 1 Sailors Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547, 27 LRRM 1108 (1950).
[2] 107 U.S.App.D.C. 402, 278 F. 2d 282.
[3] 1 Sailors Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547, 27 LRRM 1108 (1950).

2. The primary employer must be engaged in its normal business at the secondary site (disputed work is being performed,
3. The picketing must be limited to places reasonably close to the situs of the dispute (establishing gate reserved for primary employer shift the site of the dispute to that gate), and
4. The picketing must clearly disclose that the dispute is with the primary employer Signs must identify targeted employer).

The Board held that if all the four conditions, now referred to as the *Moore Dry Dock Standards*, are met, then the picketing shall be deemed lawful.

There may be issues when picketing occurs on a common situs. A common situs is a shared work environment between two separate employers. To answer the question whether picketing is allowed, hinges on two key questions:

1. Which employer can claim ownership and control of the worksite, and
2. Which employer is the target of the labor dispute?

The key case for regulating picketing on construction sites is *Denver Building Trades*. The NLRB held that a construction site is deemed a "secondary site" for all contractors working on that site. Therefore, if picketing arises on a site that your team is working on – the two consequences can be brought to light.

1. The Union must show that is has the right to picket at the construction site (in accordance with *Moore Dry Dock* standards), and
2. The general contractor may create and utilize reserved gates for each contractor on site (in accordance with *General Electric*).

WHAT IS UNLAWFUL PICKET (SECONDARY BOYCOTT)

It is unlawful for a union to coerce a neutral employer to cease doing business with a primary employer under Section 8(b)(4) of the NLRA. Generally speaking, a common-situs picketing that complies with *Moore Dry Dock* standards is presumed lawful; therefore, common-situs picketing that does not comply with those specific standards are unlawful.

One case heavily relied upon is *Labor Board v. Denver Bldg. Council, 341 U.S. 675 (1951).* In that case, a subcontractor was hired to complete electrical work on a new building. The subcontractor hired for electrical work were the only workers that were non-union on the entire site. All other worker on this project were union. Over half of the cost of raw materials purchased by the subcontractor for electrical work were purchased from out-of-state. The NLRB and the Court of Appeals determined that a strike by the union employees would affect interstate commerce.

Originally, this dispute began with the Union notifying the general contractor that the union workers found the job site to be unfair considering the non-union subcontractor that was employed there. The Union then notified all its affiliates working on the site that picketing would

begin on a certain date and further ordered the members of affiliated unions to leave the job and remain away until otherwise ordered. The Union picketed from January 9 through January 22. While the picketing was occurring, no union members reported to work. Only the non-union electricians reported to the job site during those weeks in January. Then, on January 22, the general contractor instructed the non-union electricians, before they had completed the job, to get off the worksite so that work could continue and union workers would come back. The pickets were removed, and union employees came back to job site. The non-union electricians protested and were denied entrance to the site. The electricians, along with the Regional Director of the NLRB, issued the complaint against the unions involved.

The electricians argued that the unions engaged in actions (picketing and engaging in a strike) that forced the general contractor to cease doing business with the electricians. The Court held that because the intention of the strike and picket was to pressure the general contractor to terminate its contract with that subcontractor (who was employing nonunion labor for this project) was coercive and unlawful. The Court determined this strike/picket fell under the definition of an unfair labor practice within the meaning of § 8(b)(4)(A) of the National Labor Relations Act, as amended by the Labor Management Relations Act, of 1947 and ordered a cease and desist.

In addition to *Labor Board v. Denver Building Council*, another relevant case to know is *Fidelity Interior Construction, Inc., Fidelity Interior, L.L.C., Plaintiffs–Appellees, V. The Southeastern Carpenters Regional Council of The United Brotherhood Of Carpenters And Joiners Of America, Defendant–Appellant (2012).* Southeastern Carpenters Regional Council began an area standards campaign to pressure non-union interior systems contractors in Atlanta into raising the pay and benefits of their employees. It became public knowledge that the Union had decided "to eliminate the threat to [its] standards posed by Fidelity within 90 days." That strategy included targeting neutral contractors and property managers who employed Fidelity.

The union sent warning letters to neutral contractors, tenants, property owners, and managers with whom Fidelity worked, as well as to businesses with whom the neutral parties contracted. In these letters, the union warned the neutral third parties that its campaign against Fidelity "encompass[ed] all parties associated with projects where Fidelity Construction Inc. is employed." The union explained that its "campaign include[d] highly visible lawful banner displays, demonstrations, and distribution of handbills at job sites and premises of property owners, developers, general contractors, and other firms involved with projects where Fidelity Interior Construction Inc. [was] employed." The union attached a copy of a leaflet, a document entitled "Instructions for Picketers," and a list of "certified area standard contractors."

The Union began their campaign by picketing and bannering at a hospital. The owner of the hospital asked the General Contractor to remove Emory from the jobsite (being the hospital). The pickets subsided while a union subcontractor was temporarily hired. After the union had left, Fidelity was brought back to the job site and finished the project. The Union continued to picket and banner numerous employers that had hired Fidelity, including an architecture firm, other construction companies, public plazas, etc. Fidelity was losing business left and right as the Union caused such a ruckus as to prevent a normal work day to proceed.

Finally, Fidelity filed a complaint alleging that the union had violated section 8(b)(4)(ii) of the National Labor Relations Act. Fidelity alleged that the union had intended to coerce Fidelity employees into joining a union, and neutral employers of Fidelity into firing or refusing to hire Fidelity. The union moved to exclude evidence of banners, handbills, threats to picket, and threats to banner as evidence of unlawful conduct. The district court granted the motion to exclude evidence of banners and handbills as evidence of unlawful conduct but denied the motion to exclude evidence of threats to picket or threats to banner. The jury returned a verdict against the union. Although the jury rejected the theory that the union had intended to coerce Fidelity employees into joining the union, the jury found that the union had conducted a secondary boycott of Fidelity.

The union moved for judgment as a matter of law or, in the alternative, for a new trial. The district court denied the motions and ruled that its jury instructions correctly stated the law, and that Fidelity had presented enough evidence at trial to permit the jury to infer that its calculation of lost profits was a "reasonable approximation of the actual injury sustained."

A case that focuses on whether the Unions violated Section 8(b)(4)(ii)(B) of the Act by displaying large, stationary banners at the business locations of various secondary employers is *Locals 1827, 1506, and 209, United Brotherhood of Carpenters and Joiners of America (United Parcel Service, Inc.) (28-CC-00933 et al.; 357 NLRB No. 44) Las Vegas, NV (2011)*. Originally held that it was unlawful conduct by the ALJ, on appeal it was reversed. The Board found that the Unions' stationary banner displays did <u>not</u> violate the Act's provisions making it an unfair labor practice for unions or their agents "to threaten, coerce, or restrain" persons or industries engaged in commerce with an object of "forcing or requiring any person to cease doing business with any person."

The Board majority relied on its decision in *Carpenters Local No. 1506 (Eliason & Knuth of Arizona, Inc.), 355 NLRB No. 159 (August 27, 2010),* and several other decisions that followed, all of which found that similar banner displays did not "threaten, coerce or restrain." In finding that the banner displays in United Parcel Service were not coercive, the Board majority addressed customer reactions to the banner displays, the positioning of the banners, and the conduct of individuals distributing handbills on connection with the banners.

IBEW Local 357 (Convention Technical Services), 367 NLRB No. 61 (December 27, 2018) is the most recent case, decided on December 27, 2018, addressing the legality of threats made against neutral employers. In this case, the common situs was a convention center. The Union involved here sent a letter giving notice to the neutral employer – the Las Vegas Convention and Visitors Authority (LVCVA), that an area-standards picketing would soon occur. This letter sent to LVCVA became the issue of the case. The NLRB stated in its finding that the "broadly worded and unqualified notice, sent to a neutral employer, that the union intends to picket a worksite the neutral shares with the primary employer is inherently coercive." Remember, if the activity is deemed coercive, then it is unlawful according to the NLRA. Though secondary activity generally is viewed as lawful, such as bannering or inflating a large rat, secondary activity that is aimed at a neutral employee or company is unlawful. In this case, due to the context in which the picketing would occur, the Board had determined the union engaged in unlawful conduct, violating Section 8(b)(4) of the Act.

HOW TO PREVENT PICKETS

If you are a general contractor or developer, do not have union and non-union trades on the same construction site. If the trades are all union, then there should not be any target of a picket. If all trades are non-union, then you may get a picket, but most non-union workers will ignore them.

HOW TO COUNTERACT PICKETS

- **RESERVE TIME**

    - In situations where a reserved gate (see below for more details regarding a reserved gate) is not practical or possible, reserved hours are often recommended. Recall that under the *Moor Dry Dock* standards, picketing may only occur when the primary employer is engaged "in its normal business at the situs." Therefore, changing the work schedule for the primary employer may be enough to shield neutral parties from the dispute.

- **RESERVE GATE**

    - It is exactly what is sounds like – separate gate entrances for different employers. Neutral employers may often request a separate gate for its employees and suppliers. This allows the neutral employer, employees, and suppliers access to the worksite without having to pass through a picket line. Be sure that the gates are separate and distinct in location and signage.

- **THE NEED FOR CLARITY**

    - In a common situs picket situation, it is extremely important to be clear and explicit with the union in setting up either or both of the picket counteractions above. Consult with counsel about drafting a letter to the union outlining the nature of the picket (area standards vs. recognitional); when the primary employer will and will not be on the work site; the most exact location of the gates and which is reserved for the primary employer (and its suppliers) and which is reserved for neutral employers (include a map if possible). Any confusion on these points and the union will claim that it was not sure where and when to confine its picket activities.

WHAT IS BANNERING

Bannering is secondary activity that merely informs the public of a dispute. It usually does not name the primary employer, but names an employer with a tenuous relationship to the primary employer. This type of activity cannot be threatening or coercive like a typical picket.

People holding a sign (banner), handing out leaflets, and even the display of an inflatable rat have been found to be non-coercive and non-threatening.[4]

HOW DOES BANNERING DIFFER FROM PICKETING?

*Sheet Metal Workers International Association, Local 15, AFL-CIO and Galencare, Inc., d/b/a Brandon Regional Medical Center and Energy Air, Inc. (12-CC-01258 et al.; 356 NLRB No. 162) Tampa, FL, May 26, 2011*is a great case that shows the difference between bannering and picketing. The Union had a primary labor dispute with two contracting companies. Union targeted the hospital, where the contracting companies were engaged in work.

The Board held neither displaying a large rat balloon, nor displaying a leaflet on public property in front of a hospital, constituted picketing under NLRA therefore neither coercive nor unlawful. This included the Union member that stood at hospital entrance, displaying a leaflet, and presenting his two "outstretched arms." Additionally, the Board concluded that the rat and leaflet are "expressive activity" protected by the First Amendment. The Board referenced its decision in Carpenters Local 1506 (Eliason & Knuth), 355 NLRB No. 159 (2010) (see below). This case extended the precedent of what bannering looks like by specifically allowing, and not labeling as picketing, the display of an inflatable rat and holding a leaflet.

Carpenters Local 1506 (Eliason & Knuth), 355 NLRB No. 159 (2010) is another case for reference. In this case, the Union engaged in bannering by utilizing banners that were 3-4 feet high, 15-20 feet long, and stated "SHAME ON [secondary employer]" in large letters. The banners were placed between 15-1,050 feet from nearest entrance to secondary employers' establishment. No one was patrolling, no one held signs (only the banner was present).

The NLRB held bannering by unions at locations associated with secondary employers did not constitute picketing nor did it establish a threat or coercion under the NLRA. The Board found that the "nonconfrontational" displays of stationary banners differed from traditional picketing. Further, the Board noted that there was no precedent – neither in the text of the NLRA nor in the legislative history – that could establish Congressional intent to prohibit a peaceful, stationary display of a banner.

Two additional cases, that were decided in 2010, are *Grayhawk Development*[5] and *AGC San Diego.*[6] These two cases give guidance on how the NLRB defines bannering.

In *Grayhawk*, union members displayed large banners that stated they had a "labor dispute" with a nonunion employer. The banners were displayed at several locations associated with secondary employers. The Administrative Law Judge found that the banners alone were not enough to establish coercion, threats, or restraint, and dismissed the case. The Board affirmed the Administrative Law Judge's finding, and held that Section 8(b)(4)(ii)(B) was not violated.

---

[4] *See.* 1 Sailors Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547, 27 LRRM 1108 (1950).
[5] *Carpenters Locals 184 and 1498 (Grayhawk Development, Inc.), 355 NLRB No. 188 (Sept. 2010)*
[6] *Carpenters Local 1506 (AGC San Diego Chapter), 355 NLRB No. 191 (Sept. 2010)*

In *AGC San Diego,* again union employees were displaying large banners; however, this time the union members' conduct did not stop there. In addition to the banners being displayed in a very public area (adjacent to a public sidewalk), the union representatives also passed out leaflets. The leaflets included on them a drawing of a rat gnawing on an American flag (implying that the non-union employer was anti-American. Regardless of the leaflets and rat image, the Board held the conduct here did not violate Section 8. The Board reasoned that the union members lacked the type of conduct that would be evidence of a coercive intent. For example, the Board pointed out that there were no traditional picket signs, the union members did not attempt to block anyone, and there was no patrolling. With no evidence of coercion, the Board deemed this type of bannering lawful.

RECENT DEVELOPMENTS (below are most recent)

Preferred Building Services, Inc. and Rafael Ortiz d/b/a Ortiz Janitorial Services, Joint Employers and Service Employees International Union Local 87. Case 20–CA–149353

This recent case out of California is gaining a lot of attention. Originally, an administrative law judge ruled that Californian janitors had the right to picket outside their workplace, against one of their joint-employers. The judge held that based on the evidence provided it was a joint-employer situation as both employers were involved in the hiring, firing, discipling, etc. of the janitors. However, the NLRB disagreed. The NLRB held this was not a situation of employees picketing a joint-employer, but rather employees picketing aimed at a secondary employer, thus illegal under federal labor law. The janitors were deemed to be subcontracted and could be terminated in that specific situation.

UNITE HERE! Local 5 (Aqua-Aston Hospitality, LLC)

The NLRB held that employees picketing, causing blockages, including to vehicles on employer property attempting to enter/exit violated Section 8 and was therefore unlawful.

Overall, rulings generally continue to solidify unions' ability to deploy numerous tactics against secondary employers with few restrictions; provided that any displays are stationary and at least somewhat removed from the immediate entrance to the secondary employers' place of business. Rationale being the very fine line between protecting first amendment rights and violating them.

The Board has recently shown a willingness to consider the manner and method of bannering. The trend with the current Board and General Counsel has been to scrutinize the manner and method a union utilizes in what they consider to be bannering. Since some bannering activities border on picketing, we should start seeing some Board cases reigning in the scope of bannering.