Reserved Gate Systems: Key Legal Issues and Best Practices

A Practical Guidance® Practice Note by Joshua S. Fox, Proskauer Rose LLP

Joshua S. Fox
Proskauer Rose LLP

This practice note provides guidance on the key legal issues and best practices regarding reserved gate systems, which are also sometimes referred to as dual gate or two-gate systems. Employers implement reserved gate systems when union picketing occurs on an employer's property. Reserved gate systems are designed to enable employers to avoid severe business disruptions that such picketing causes.

This practice note will discuss the legal implications of establishing a reserved gate system under the National Labor Relations Act (NLRA or Act), with a focus on preventing secondary boycott activity and disruptions toward secondary employers. As explained below, to be effective, employers must properly and carefully maintain reserved gate systems.

This practice note addresses the following issues regarding reserved gate systems:

- What Is a Reserved Gate System?
- What Are an Employer's Rights and Obligations regarding Reserved Gate Systems?
- What Are an Employee's Rights and Obligations regarding Reserved Gate Systems?
- What Are a Labor Union's Rights and Obligations regarding Reserved Gate Systems?
- What Are the Best Practices for Implementing Effective Reserved Gate Systems?

For more information on establishing a reserved gate system, see Economic Weapons for Unions and Employers: Determining the Scope of Permitted Activities and National Labor Relations Act: Law & Practice § 21.06 – Common Situs Picketing. For an annotated reserved gate policy and reserved gate labor dispute clause, see Reserved Gate Policy and Reserved Gate Labor Dispute Clause.

For related templates, see Letter to Neutral Employers Notifying Them of Reserved Gate System or Reserved Time, Letter to Primary Employer Notifying It About Reserved Gate System or Reserved Time, Letter to Primary Union Notifying It About Reserved Gate System or Reserved Time, and Letter to Neutral Unions Notifying Them about Reserved Gate System or Reserved Time.

For information on how employers can respond to strikes, see Strikes: Employers' Response Options and Best Strategies, Injunctions and Other Legal Remedies for Unlawful Union Activity, and Injunctions and Other Legal Remedies for Unlawful Union Activity — Norris-LaGuardia vs. State Law Injunctions.

For a video on unfair labor practices, see NLRA Unfair Labor Practices Video.

What Is a Reserved Gate System?

A reserved gate system is established when an employer expects union picketing to occur on or near its premises. Picketing typically, although not exclusively, means persons patrolling at the entrance to a targeted business and carrying signs affixed to sticks. Other conduct may fall under the definition of picketing, depending on the circumstances. See

Economic Weapons for Unions and Employers: Determining the Scope of Permitted Activities.

In such circumstances, an employer may create separate entrances on a common situs (i.e., a facility or site shared by multiple employers) for the primary employer to use (i.e., the employer with whom the union has a labor dispute), and for neutral secondary employers, employees, and others to use (i.e., neutral third parties that may use the premises but with whom the union does not have a labor dispute). See National Labor Relations Act: Law & Practice § 21.06 – Common Situs Picketing.

A legally valid and enforced reserved gate system ensures that any picketing occurs only at the gate reserved for the primary employer and not at the gates reserved for neutral employers and their employees who are not involved in the labor dispute. The legal justification for establishing a reserved gate system is that labor unions are not permitted to picket with the objective of forcing a neutral employer to cease doing business with the primary employer, because doing so would violate Section 8(b)(4) of the NLRA (29 U.S.C. § 158(b)(4)). See NLRA Unfair Labor Practices Video and NLRA Section 8 Unfair Labor Practices by Employers and Unions: Key Considerations.

What Are an Employer's Rights and Obligations regarding Reserved Gate Systems?

This section will focus on the rights and obligations of primary and second employers in the context of reserved gate systems.

Primary Employer Rights and Obligations

Implementing a valid reserved gate system best enables a primary employer to confine union picketing activity to a single location at its premises, thereby minimizing business disruptions at a common situs. To keep a reserved gate system viable, the primary employer must only use the reserved gate for ingress and egress of the premises.

Union picketing in areas beyond the reasonable proximity of the reserved gate can constitute evidence that the union is pursuing an unlawful secondary objective in violation of Section 8(b)(4) of the NLRA—in which case, the employer can bring an unfair labor practice (ULP) charge against the union. See, e.g., Int'l Union of Operating Eng'rs, Local 150 v. NLRB, 47 F.3d 218, 223 (7th Cir. 1995); Local 7, Sheet Metal Workers' International Association, 345 NLRB 1322, 1324 (2005). For more guidance, see NLRA Unfair Labor Practices Video, NLRA Section 8 Unfair Labor Practices by Employers and Unions: Key Considerations, NLRB Procedures for Unfair Labor Practice Cases, and NLRB Unfair Labor Practice Case Flowchart.

Secondary Employer Rights and Obligations

This section addresses secondary employer protections, requirements, and the "ally doctrine."

NLRA Section 8(b)(4) Protections for Secondary Employers

While employees have a right to strike under the NLRA, Section 8(b)(4) of the Act prohibits unions and their members from engaging in certain prohibited conduct toward secondary employers or secondary employees as a means of exerting pressure on primary employers. Reserved gate systems are intended to confine union picketing to only one area of a common situs to protect secondary employers and employees from potential NLRA violations.

To preserve secondary employers' rights to enforce Section 8(b)(4) of the Act, secondary employers may not use the designated reserved gate for primary employers. If a union or its members ignore a properly enforced reserved gate system, then the facts may give rise to a potential violation of Section 8(b)(4) of the Act against the union.

Section 8(b)(4) of the Act addresses conduct by a labor organization or its agents directed at neutral secondary employers and/or employees. To state a violation of Section 8(b)(4) of the NLRA, the charging party must demonstrate that the union or its agents engaged in prohibited conduct with a prohibited purpose. See 29 U.S.C. § 158(b)(4). Also see NLRA Unfair Labor Practices Video and NLRA Section 8 Unfair Labor Practices by Employers and Unions: Key Considerations.

Prohibited Conduct

To demonstrate the union or its agents engaged in prohibited conduct, the charging party must show coercive or restraining conduct (i.e., more than "mere persuasion"). This typically includes most forms of picketing, such as:

- People with signs patrolling outside the premises
- People sitting in cars and talking to delivery drivers –or–
- A large crowd, without any signs, shouting for others to act

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568; Service Emps. Local 399 (Delta Air Lines), 293 NLRB 602 (1989); Storer Communications v. Broadcast Employees, 854 F.2d 144 (6th Cir. 1988).

The National Labor Relations Board (NLRB or Board) has found certain circumstances do not give rise to coercive conduct, such as demonstrations and marches when the demonstrators do not have signs and are not marching, peaceful "bannering," and peaceful consumer hand billing not directed to secondary employers. See, e.g., Television & Radio Artists Local 55 (Great Western Broadcasting Corp.), 134 NLRB 1617 (1961); Plumbers & Pipe Fitters Local 32 (Ramada, Inc.), 302 NLRB 919 (1991); Eliason, 355 NLRB 797 at 802–10.

Prohibited Purpose

The second element in establishing a Section 8(b)(4) unfair labor practice charge requires the charging party to show (as relevant here) that the union designed its conduct to force or require any person to "cease" doing business with any other person, or any other employer to recognize or bargain with the union. The quintessential example is a union picketing and seeking to convince truck drivers from delivering goods to the primary employer's manufacturing plant that is being struck. See, e.g., Service Employees Union, 312 NLRB 715 at 743 (1993), enforced mem., 103 F.3d 139 (9th Cir. 1996); Warshawsky & Co. v. NLRB, 182 F.3d 948 (D.C. Cir. 1999).

Although the Act speaks of efforts to have neutrals "cease doing business" with the primary employer, a violation occurs even if the neutral employer that is being struck has no business relationship at all with the primary. Service Employees Union, 312 NLRB 715, 743 (1993) ("it is no less a violation of Section 8(b)(4)(B) of the Act for a labor organization to disrupt the business of an unoffending neutral employer, which has no business relationship with the primary employer, in the hope that said neutral will be pressured into interceding in a labor dispute between the labor organization and the primary employer").

The "Ally Doctrine"—Limitations on the Rights of Non-neutral Secondary Employers

Employers that may be nominally separate from the primary employer can be considered "primary" under certain circumstances, and thus subject to lawful picketing pursuant to the NLRB's "ally doctrine." Determining whether an employer is a primary or secondary under the "ally doctrine" is in important threshold issue when establishing a reserved gate system.

The "ally doctrine" is premised on the rationale that secondary employers that effectively are acting as part of the primary employer should not be protected. Thus, to remain exempt from picketing activity, the secondary employer must be "wholly unconcerned" in the labor dispute. Douds v. Metro. Fed'n of Architects Local 231, 75 F. Supp. 672, 676 (S.D.N.Y. 1948) (quoting 93 CONG. REC. 3423, April 29, 1947).

The ally doctrine has two elements: "An employer may become an ally to the primary employer either because the former undertakes to perform struck work on behalf of the primary employer or because of the relationship between two employers, their interests are said to be allied in interest, i.e., they are a single employer or they constitute a straight line operation." Int'l Union of Operating Eng'rs, Local 150 (Harsco Corp.), 1993 NLRB LEXIS 88 (Jan. 22, 1993) (ALJ decision).

In evaluating whether a "single employer" or "straight line" operation exists, the Board looks to whether the primary and related company have:

- Common ownership
- Common management
- Centralized control of labor relations –and–
- Inter-relationship of operations

Newspaper & Mail Deliverers' Union of New York (Gannett Co.), 271 NLRB 60, 67 (1984) (citation omitted). None of the above factors is considered in isolation. 271 NLRB 60, 67 (1984). Rather, the Board "weighs all of them to determine whether in fact one employer is involved in or is wholly unconcerned with the labor disputes of the other." 271 NLRB 60, 67 (1984).

What Are an Employee's Rights and Obligations regarding Reserved Gate Systems?

In the previous section, we addressed employer rights and obligations in connection to reserved gate systems. Below, we address rights and obligations for various types of employees regarding reserved gate systems.

Section 8(b)(4) Protections for Secondary Employees

As discussed above in the subsection entitled "NLRA Section 8(b)(4) Protections for Secondary Employers," Section 8(b)(4) of the NLRA limits unions' or its agents' right to strike by prohibiting certain types of "secondary" conduct intended to influence the behavior of a secondary employer or secondary employees as a means to exert pressure on a "primary" employer.

Union conduct directed at neutral secondary employees is governed by Section 8(b)(4)(i), which prohibits unions or their agents from inducing or encouraging—for any proscribed purpose set forth in Section 8(b)(4)—any employee of a neutral secondary employer to strike, picket, or participate

in "hot cargo" partial strikes/boycotts. 29 U.S.C. § 158(b)(4)(i). See Economic Weapons for Unions and Employers: Determining the Scope of Permitted Activities, NLRA Unfair Labor Practices Video, and NLRA Section 8 Unfair Labor Practices by Employers and Unions: Key Considerations. Also see National Labor Relations Act: Law & Practice § 21.09 – Hot Cargo Agreements.

Section 8(b)(4) Protections for Manager-Employees

Interactions with individual managers of neutral employers may trigger application of Section 8(b)(4)(i) (29 U.S.C. § 158(b)(4)(i)) (which addresses conduct directed toward secondary employers) and/or Section 8(b)(4)(i)(ii) (29 U.S.C. § 158(b)(4)(i)) (which addresses conduct directed toward secondary employees) of the NLRA. This is because managers serve in a management capacity as an agent for the employer, but also are considered employees, performing services for the employer.

For example, if a union or its agents encourage the manager of a neutral business not to do business with a primary employer, the union's conduct may be analyzed under either or both statutes. In such a case, the manager is both "an individual employed" by the secondary neutral under Section 8(b)(4)(i) and a "person engaged in commerce," or a secondary employer under Section 8(b)(4)(ii).

As "an individual employed" by the secondary neutral employer, the union may not induce or encourage the manager to refuse to work to pressure the neutral employer to cease doing business with the primary employer. Under Section 8(b)(4)(i), it would not matter that the union did not threaten, coerce, or restrain the manager-employee. Rather, by "encourag[ing]" an "individual employed" by a secondary neutral employer to stop doing business with a primary employer, the union has violated Section 8(b)(4)(i). 29 U.S.C. § 158(b)(4)(i).

Conversely, because the union did not threaten, coerce, or restrain the manager, the union did not violate Section 8(b)(4)(ii) under this scenario. 29 U.S.C. § 158(b)(4)(ii) and (ii).

Employees' Right to Strike

The prohibitions discussed in this practice note are merely exceptions to employees' general right to strike under the NLRA.

Section 8(b)(4) reiterates employees' statutory right to strike in two provisions:

- **Protection for primary strikes/picketing.** "[N]othing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."
- **Protection for secondary sympathy strikes/picketing.** "[N]othing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter[.]"

Accordingly, implementing a reserved gate system does not revoke union employees' right to strike and engage in lawful primary activity; rather, it confines the spaces in which they may legally do so.

This said, employers and employees should be mindful of any contractual prohibitions on an employees' right to engage in a primary strike, sympathy strike, or other similar conduct that may apply to the situation.

What Are a Labor Union's Rights and Obligations regarding Reserved Gate Systems?

In the previous two sections, we addressed employer and employee rights and obligations in connection to reserved gate systems. Below, we address rights and obligations for unions regarding reserved gate systems.

A Labor Union's Duty to Minimize the Impact of Picketing's Secondary Effects on Neutral Secondary Employers

If a primary employer shares a building or worksite with one or more neutral secondary employers—a so-called "common situs" situation—the union has a duty to minimize the impact of the secondary effects of picketing on neutral secondary employers, except where that minimization would substantially impair the effectiveness of lawful primary picketing. See National Labor Relations Act: Law & Practice § 21.06 – Common Situs Picketing. This duty is governed by the Moore Dry Dock standards developed in In re Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547 (1950).

The Moore Dry Dock Standards

A labor union picketing a primary employer working on the premises of a secondary employer is presumed to engage in lawful primary picketing if it meets all four requirements

of the *Moore Dry Dock* standards. The *Moore Dry Dock* standards require that union picketing:

1. Is strictly limited to times when the situs of the dispute is located on the secondary employer's premises
2. Occurs only when the primary employer is engaged in its normal business at the situs
3. Is limited to locations reasonably close to the primary's situs (cf. "reserved gate" implications) –and–
4. Makes clear to uninformed observers that the picketers' dispute is with the primary employer (and not the neutral secondary)

In re Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547 (1950).

There is a rebuttable presumption that if picketing complies with the *Moore Dry Dock* standards, it is lawful, and vice versa. See, e.g., Ironworkers Local 433, 293 NLRB 621, 622 (1989) (noting that although "the failure to comply with any one of the *Moore Dry Dock* criteria does not constitute a per se violation of the Act, the failure does create a presumption that the picketing had an unlawful secondary purpose").

Applying the Moore Dry Dock Standards—Ascertaining a Union's Objective

The *Moore Dry Dock* standards are not dispositive—they are only a method of examining evidence concerning a union's objective in its allegedly unlawful conduct.

The Board has made clear that absent evidence of an unlawful union objective, technical violations of the *Moore Dry Dock* standards do not necessarily establish that a union violated the NLRA. Roofers Local 135 (Advanced Coatings & Insulation), 266 NLRB 321 (1983). Further, the complaining party bears the burden of proving the union's unlawful intent to establish a violation of the Act. See Pacific N.W. Carpenters (DWA Trade Show & Exposition Servs.), 339 NLRB 1027 (2003).

For example, in Electrical Workers, IBEW, Local 3 (Surf Hunter Electric Co., Inc.), 172 NLRB 1101 (1968), although a union's picket signs incorrectly identified the employer being picketed (a technical violation of the *Moore Dry Dock* standards), the union defeated a ULP charge because it corrected the error on the signs immediately upon its discovery. The immediate correction of the error was sufficient evidence that the union's actions were not compelled by an unlawful objective. Electrical Workers, IBEW, Local 3, 172 NLRB at 1101–02.

Conversely, in Laborers Local 389 (Calcon Construction), 287 NLRB 570 (1987), the Board deemed a union to have violated Section 8(b)(4)(i) and (ii)(B) of the NLRA by picketing a common situs with signs that failed to identify the primary employer because there was evidence of an unlawful objective. The Board found that the union's failure to identify the primary employer reflected an intention to enmesh neutrals. Id.

Further, even absent a technical violation of the *Moore Dry Dock* standards, a union may be deemed in violation of Section 8(b)(4) if other evidence of an unlawful objective is present, such as fining the members employed by neutral employers who work behind a picket line. Carpenters Dist. Council (Orange County) Local 2361 (J.A. Stewart Constr. Co.), 242 NLRB 585 (1979).

For instance, in Electrical Workers (IBEW) Local 441 (Rollins Commc'ns), 208 NLRB 943 (1974), a union advised to a neutral employer that union picketing would cease if the neutral employer stopped doing business with the primary employer until the union's demands were met. Although the union's picketing was in technical compliance with the *Moore Dry Dock* standards, the union's statement to the neutral employer constituted sufficient evidence of an unlawful objective. Electrical Workers (IBEW) Local 441, 208 NLRB at 944.

What Are the Best Practices for Implementing Effective Reserved Gate Systems?

This section takes you step by step in advising employers on properly setting up a reserved gate system.

How to Set Up a Reserved Gate System

First, set up a suitable building entrance. Select a suitable building entrance that will serve as the "reserved gate." This is where the picketing will be permitted. The reserved gate entrance should be as far as possible from other entrances, so as to minimize the picketers' ability to interfere with others not involved in the current dispute. Keep in mind that a primary employer may not design reserved gate systems in a manner intended to interfere with the union's right to convey its message to the public and the primary employer's employees, suppliers, and visitors. Electrical Workers (IBEW) Local 453 (Southern Sun Elec. Corp.), 237 NLRB 829 (1978). However, the NLRB does not mandate that a primary employer establish a primary gate in a location that maximizes a picket's chance of reaching the general public. Carpenters Local 33 v. NLRB (CB Constr. Co.), 873 F.2d 316 (D.C. Cir. 1989), aff'g 289 NLRB 528 (1988). See also Electrical Workers (IBEW) Local 970 (Interox America), 306 NLRB 54 (1992).

Second, post signs at all building entrances. At the reserved gate entrance, post signs clearly indicating that the reserved gate must be used only by employees of the primary employer and those visiting or doing business with them. At all of the "neutral" entrances, signs should clearly indicate that those entrances are only for the use of those uninvolved with the labor dispute (e.g., neutral employers and employees). This includes all of their visitors, employees, and suppliers, and the general public and others not involved in the labor dispute. Signs at all of the "neutral" entrances should also indicate that they are not to be used by employees of the primary employer who have a dispute with the union and those visiting or doing business with them. Posted signs must be visible from the street or sidewalk adjacent to the premises, and from the interior of the building, so that individuals entering or exiting will be sure to use the proper entrance or exit. The signs should be checked daily to ensure that they are not altered, defaced, or removed.

Third, send written notification to the union. An employer must provide written notice that it is implementing a reserved gate to the picketing union, by email with a read receipt, by fax, by hand, by overnight mail, and/or certified letter.

Fourth, notify the NLRB regional director, neutral employers that share the common situs, and vendors/ suppliers. The reserved gate system only works if those using the entrances know that they are restricted to certain entrances and comply with the restrictions. The primary employer should notify any other companies located in the building as to which entrance they must use, and the primary employer should issue regular reminder notices. To the extent possible, the primary employer should ask neutral employers to instruct their employees and suppliers about the correct "neutral" entrance to use.

Fifth, monitor the entrances closely. This step is critical to prevent contamination of the entrances (i.e., use of the wrong entrances). Select a responsible, reliable observer who can be trusted to monitor each of the entrances frequently and make sure that each entrance is being properly used. The more observers that the primary employer can assign, the better (one at each entrance would be ideal, but understandingly difficult to provide). Observers should keep a written log to provide proof that the reserved gate system is being properly maintained. The reserved gate should be kept locked when not in use, eliminating the need for an observer to be posted. If the reserved gate is locked at times, however, the primary employer should post a sign indicating how to call to gain access at that gate. Also keep in mind that, with respect to union picketing at a reserved gate, the NLRB insists on clear identification of the employer being picketed, even when the picketing is confined to the reserved gate. See Ironworkers Local 433, 280 NLRB 1325 (1986).

"Contamination" of the Reserved Gate System

If a resident, tenant, employee, or supplier uses the wrong entrance, the reserved gate system may become "tainted" or "contaminated," thus allowing the union to picket all entrances until the system is reestablished. Thus, employers must exercise great caution to ensure that proper entrances are used at all times.

The system is considered reestablished only after the union is notified that the reserved gate system will be enforced as originally designed as of the following day; no actual physical change to the reserved gate entrance arrangement is necessary.

Observation of Daily Activity

To the degree possible, building personnel should observe and keep written records of any picketing activities, including:

- The number of pickets
- The area they patrol
- The pertinent dates and times –and–
- The verbatim language of the picket signs

Observers should note any dangerous and/or potentially unlawful incidents along with names (if known) and physical descriptions of the pickets, other individuals, participating union representatives, and the license numbers of any vehicles involved.

In the event of any improper activities, photographs and/or videos of the picket signs and of the improper activities are particularly helpful in documenting daily events.

Supervisory Personnel

It is necessary to brief building supervisory personnel on the purpose, design, and use of the reserved gate system, and on the absolute necessity of maintaining separate entrances to minimize disruption of business activities.

Supervisory personnel should also be prepared to respond immediately to any improper actions taken by the pickets, and to notify appropriate management officials of such activity.

Thank you to John Sedarous, Proskauer Summer Associate, who assisted in developing this practice note.

Joshua S. Fox, Senior Counsel, Proskauer Rose LLP

Joshua S. Fox is a senior counsel in the Labor & Employment Law Department and a member of the Sports, Labor-Management Relations, Class and Collective Actions and Wage and Hour Groups.

As a member of the Sports Law Group, Josh has represented several Major League Baseball Clubs in all aspects of the salary arbitration process, including the Miami Marlins, Boston Red Sox, Los Angeles Dodgers, Kansas City Royals, San Francisco Giants, Tampa Bay Rays and Toronto Blue Jays. In particular, Josh successfully represented the Miami Marlins in their case against All-Star Catcher J.T. Realmuto, which was a significant club victory in salary arbitration. Josh also represents Major League Baseball and its clubs in ongoing litigation brought by current and former minor league players who allege minimum wage and overtime violations. Josh participated on the team that successfully defended Major League Baseball in a wage-and-hour lawsuit brought by a former volunteer for the 2013 All-Star FanFest, who alleged minimum wage violations under federal and state law. The lawsuit was dismissed by the federal district court, and was affirmed by the U.S. Court of Appeals for the Second Circuit.

Josh also has extensive experience representing professional sports leagues and teams in grievance arbitration proceedings, including playing a vital role in all aspects of the grievance challenging the suspension for use of performance-enhancing drugs of then-New York Yankees third baseman Alex Rodriguez. Josh also has counseled NHL Clubs and served on the trial teams for grievances alleging violations of the collective bargaining agreement, including cases involving use of performance-enhancing substances, domestic violence issues, and supplementary discipline for on-ice conduct. He has played a key role in representing professional sports leagues in all aspects of their collective bargaining negotiations with players and officials, including the Major League Baseball, National Hockey League, the National Football League, Major League Soccer, the Professional Referee Organization, and the National Basketball Association,.