Effective Management Response to Picketing
In the Public Sector

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Preface

California higher education employers are covered by the Higher Education Employer-
Employee Relations Act (HEERA), California government Code 3560, et seq. In light of
this fact there are very few court or Public Employment Relations Board (PERB)
decisions applying and interpreting HEERA. It is instructive to look to principles and
procedures established under the National Labor Relations Act (NLRA) by the National
Labor Relations Board (NLRB), as the principles of and some of the statutory provisions
in HEERA are similar to the NLRA.

Introduction

Americans take for granted the right to picket in the context of both labor and
management relations and social issues. Americans are used to seeing on the daily news
citizens armed with placards espousing an idea, protesting an employment practice or a
perceived social wrong, marching singularly or arm in arm on the streets of America.
But how did this form of peaceful protest come into existence, particularly in relation to
employment and workers’ rights and what rights can be exercised by management in
response? Our purpose is to explore this issue and arm public sector management with
the ability to respond forcefully and legally within the framework of current employment
law.

The Britannica Concise Encyclopedia defines picketing as an “Act by workers of
standing in front of or near a workplace to call attention to their grievances, discourage
patronage, and during strikes, to discourage strikebreakers. The U. S. Norris LaGuardia
Act (1932) made it easier for workers to picket by restricting the use of court injunctions
against strikes, but the Taft – Hartley Act (1947) outlawed mass picketing.”

Section 13A of the Norris LaGuardia Act was applied by the Supreme Court of the
United States in New Negro Alliance v. Sanitary Grocery Co., and held that the Act
protected the right for peaceful dissemination of information relating to the terms and
conditions of employment even when that dissemination occurs on property of an
employer.

The Taft-Hartley Act (Labor Management Relations Act) of 1947 was designed to limit
the power of prohibited organized labor jurisdictional strikes, wildcat walkouts, solidarity
or political strikes, secondary boycotts, and define and limit the sphere of labor union picketing.

In *Thornhill v. Alabama (1940)* the Supreme Court recognized picketing as a right of communication under the First and Fourteenth Amendments to the Constitution, but set the foundation for current regulation and lawful management reactions to picketing by limiting lawful picketing in the context of fraud, misrepresentation, obstruction, threats and associated violence. In 1968 the Supreme Court in *Food Employees v. Logan Valley Pizza*, limited the employers right to unilaterally and comprehensively apply the rules of regulations applicable to strikes by injunction or control by recognizing that controls placed on management response to picketing activity must be in place to ensure that constitutionally protected communication elements inherent in picketing are protected.

**Types of Picketing**

In an opinion in 1941 the U. S. Supreme court stated that picketing is “the workingman’s means of communication.” Highly visible, pickets communicate the essence of their demand(s) or the target of their dissatisfaction in an effort to impact employer policy, highlight efforts at recognition or promote economic demands.

A **mass picket** has as a strategy the utilization of large numbers of picketers to demonstrate large scale support for a cause and the union’s ability to mobilize solidarity with members and other labor organizations. A **secondary picket** employs pickets at locations not directly connected to the issue of protest, i.e., for instance picketing at the Chancellor’s home in the case of a University labor contract dispute, or picketing at a retail outlet against a retail supplier. A **flying picket** is a strategy to mobilize a picket line that can quickly show up at any employer’s location at any time in order to thwart management efforts to limit and control picket activities. A **disruptive picket** is characterized by picket activities which utilize obstruction, intimidation, threats, etc. in an effort to interfere with staff, service users or customers.(1) An **informational picket** designed to spread information to a diverse or targeted audience regarding a union position with the objective of influencing public opinion.

**General Requirements for Legal Picketing**

Union picketing, gathering and moving across employer entrances with or without signs, in a manner that does not interfere with lawful ingress or egress of other employees or neutral third parties (such as customers, potential customers, contractors, the general public) is a protected activity. However, lawful picketing requires that unions do not violate general prohibitions against:

- Violence
- Making or handing out knowingly false and defamatory information
- Mass demonstration or disruptive behavior which is designed to disturb or defend neutral parties
- Illegal trespass
• Activities which compromise the general public health and welfare
• Picketing with organizational intent for more than 30 days without filing an election petition
• Secondary picketing aimed at coercing neutral third parties.

Management Response to Legal Picketing

In response to legal picketing management should ensure that non-picketing employees avoid confrontations and are free not to respond to any comments or actions by picketers directed at them. On the other side of the coin, non-picketing employees should not engage in action or conversation that might escalate and inflame the picket situation.

In order to protect non-striking or non-picketing employees, neutral contractors and the general public, the National Labor Relations Board (NLRB) has established the “reserved gate doctrine”. Under this doctrine, the NLRB requires that picket signs must note truthfully against whom any picketing is being conducted. Picketing must be done only at times that the target firm is engaged in work at the jobsite. Finally, the picketing must be done as closely as possible to the area in which the target firm is working. Under these principles, secondary picketing at an entrance reserved for neutral employers is subject to injunction. (2)

In the case of Moore Dry Dock, the NLRB stated with respect to common site picketing, that the picketing, to be legal, must be “limited to places reasonably close to the location of the situs.” This ruling was critical in the general acceptance and utilization of the reserve gate system in establishing picket locations.

Secondary Picketing and Reserved Gates

In order to establish a legally protected reserve gate it is essential that two reserved entrances be clearly identified, marked and separated and that the two entrance gates established be the only two gates used to enter or leave the worksite. All other entrances should be blocked and cordoned off.

Gate 1 – Is the gate through which all employees of the targeted employer (including management) and suppliers use to enter and leave the project or place of business and should be posted with a sign which states:

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GATE 1
This entrance is reserved for the exclusive use of employees, business visitors and suppliers of (Primary Employer). All other persons must use Gate 2. Restrictions strictly enforced.
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Gate 2 – Is the gate through which all other persons are to use to enter and leave the project or place of business and should be posted with a sign which states:
GATE 2

This entrance must not be used by (Primary Employer) and its employees. This entrance is for the exclusive use of employees and suppliers of neutral employers. Restrictions strictly enforced.

The union should be informed in writing with a certified receipt of the location of the gate which will be utilized by the primary employer, its employees and suppliers. If the union does not adhere to the reserve gate system the employer may elect to file and unfair labor charge with the NLRB. In addition, to avoid confusion all parties connected to the primary employer should be informed of the dual gate system, their gate location and their duty to use the primary gate, Gate 1.

Mass Picketing and Violence

As stated in the introduction, mass picketing and violence are prohibited by Taft-Hartley (1947). An employers efforts at receiving injunctive state or federal court relief from picketing characterized as mass or violent are aided by documented records detailing events on the picket line, proper notice to law enforcement agencies, complaints made to the union and unsuccessful attempts at mediation. When unlawful activity is noted, logs should be kept of union actions (how many agents and picketers, wording of signs and fliers, location of activity, time of activity and impact on primary employer and neutrals.) Note that employers should carefully consider filming unlawful union activity, but as a general rule should not film peaceful distribution of handbills or non-disruptive picketing.

Noticing Non-striking, Non-picketing Employees

Employees not participating in the strike or picketing activities are often confused and concerned about their rights and what actions are appropriate in a picket situation. Employees should be informed in writing of their right to come to work and that the law protects the right of all employees to chose to cross a picket line. In addition, labor laws protect the rights of union members to freely choose not to participate in a work stoppage or picketing. Employees should understand that engaging in strike-related activities or picketing on their own time is a protected activity and that picketing is lawful as long as it is peaceful, and that they are not obligated to respond to comments of strikers or pickets and efforts should be made at remaining non-confrontational. Employees should be instructed to inform management if they believe picketers are restricting their access to work, interfering with the normal course of business or practicing harassment techniques.

Noticing Employees of Neutral Employers

Employees of Neutral Employers should be noticed of their legal right to work and pass through Gate 2 and that an attempt by their union to threaten or discipline them for working their job is illegal. Neutral employer employees should be informed that it is illegal for their union to fine, suspend or expel them for working or to deny them benefits based on their free choice to work.
Summary
The right of union members to exercise their Constitutional communication rights through picketing has been established by legislation and enforced by high court decisions over the course of the last fifty plus years. Management must face the reality of picketing through thoughtful and strategic planning. A legal and timely response to a picket is necessary in order to avoid confusion and disruption in the workplace and prevent violence and intimidation of the workforce. The conditions under which picketing will exist in the 21st century will continue to evolve based on current Presidential administration, composition of courts and rulings by the National Labor Relations Board; however, it is clear picketing will remain a tool in dispute resolution and a point of contention between management and organized labor.


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