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## **Picketing Rights of Public Employees**

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### **1. Introduction**

Picketing is a form of speech, and therefore enjoys First Amendment protection. In the private sector, the National Labor Relations Act and other important statutes govern union-management relations. The National Labor Relations Board decides disputes arising under the NLRA.

State and local governments are **not** covered by the NLRA. But two out of three states [1] have enacted similar legislation covering some or all public employees, and have created PERBs -- public employment relations boards (or similarly named authorities) to function like the NLRB. In most states, cities and counties are required to bargain with certified unions, and in a few others the bargaining process is optional.

Although state PERBs are not bound by decisions of the NLRB, they tend to have a persuasive effect. For example, the NLRB's holding in Weingarten [2] has been followed by all but a few PERBs.

Picketing can take multiple forms. At its worst, it can block entrances or be intimidating to deliverymen and visitors. It can be silent or noisy. It can involve a few or many picketers. It may involve handbilling only, no handbilling, or a picket

line plus handbilling. Picketing can purely informational, to organize workers, or to support a work stoppage.

An often-contentious issue is the situs of a picket line or handbilling. Members of the public might avoid crossing a picket in front of a building, mall or plaza where the target employer is only one of many occupants of the structure or facility. Economic action against one punishes many.

Public employees that picket in their uniforms present additional First Amendment considerations.

## **2. Constitutional Right to Picket**

Many years ago, the Supreme Court held that members of a union may, without special statutory authorization by a state, disseminate the facts of a labor dispute, because the Federal Constitution guarantees freedom of speech. The state may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets. [Senn v. Tile Layers Prot. Un., L-5](#), #658, 301 U.S. 468 (1937).

Several years later, the Court invalidated a state statute that banned picketing. [Thornhill v. St. of Alabama](#), #39-514, 310 U.S. 88 (1940).

What about multi-use property, such as a shopping center, or business plaza? In 1968 the Court said that if a shopping center serves as a community business block and is freely accessible and open to the people in the area and those passing through, a state may not use trespass laws to exclude those who wishing to exercise their First Amendment rights on the premises in a manner, and for a purpose, generally consonant with the use to which the property is actually put. [Amalg. Food Emp. Un. L-590 v. Logan Valley Plaza](#), #478, 391 U.S. 308 (1968)

More recently, the Supreme Court said that laws may not prohibit picketing or handbilling around a courthouse, a city hall or other public buildings. [U.S. v. Grace](#), #81-1863, 461 U.S. 171, 103 S.Ct. 1702 (1983).

In 1997 several correctional officers, participated as FOP members in “informational pickets.” The then warden purportedly engaged in various forms of retaliatory behavior against them including selectively imposed discipline.

They sued in federal court, and the jury awarded each plaintiff \$300,000 for emotional distress.

On a motion to set aside the verdict, the trial judge said that each plaintiff made some showing of emotional distress such as increased stress in one's marriage, embarrassment due to one's financial situation, and uncertainty over their employment situation. One plaintiff testified to physical manifestations (including weight gain and increased sleepiness); another began medication for stress and had problems eating and sleeping.

However, the award of \$300,000 was excessive, and \$75,000 per Plaintiff is "more in line with other awards in cases brought under 42 U.S.C. §1983 where plaintiffs suffered similar harms."

The court rejected the county's claim that the plaintiffs failed to mitigate their damages by accepting alternative employment. While there is a duty in a §1983 case to attempt to mitigate damages "the burden of proving that there has been a failure to mitigate falls on the defendant," which was not put into evidence.

The court also found that plaintiffs' counsel was entitled to fees and costs in the amount of \$196,894. [Clopp v. Atlantic County](#), #00-1103, 2002 U.S. Dist. Lexis 18898, 170 LRRM (BNA) 3260 (D.N.J. 2002).

Also on the federal side, the Federal Labor Relations Authority (FLRA) reinstated a guard's security clearance that was revoked because he engaged in peaceful informational picketing at an air base. [Puerto Rico Air Natl. Guard and AFGE Local 3936](#), FLRA, #BN-CA-90241, 2000 FLRA Lexis 40, 56 FLRA No. 21, 38 (1859) G.E.R.R. 522, (3/21/00).

### **3. Civil Liability for Unlawful Picketing**

Three union locals, consisting of municipal employees, organized a picket of privately owned facilities, in order to bring pressure on the city. That action was later enjoined, but the businesses claimed losses over \$1 million due to an illegal four-day work stoppage. The businesses sued under 29 U.S. Code §158(b)(4), the Labor Management Relations Act (1947), for engaging in a secondary boycott.

The U.S. District Court dismissed the action because the Act appears to **exclude** employees of governmental entities. A three-judge appellate panel affirmed, distinguishing a 1997 case that came to a different conclusion. The upshot is that the decision to include or exclude a union of public employees for unlawful picketing is one for the Congress to decide. [Pacific Maritime Assn. v. Local 63 ILWU](#), #98-55453, 198 F.3d 1078, 1999 U.S. App. Lexis 32077 (9th Cir. 1999).

#### 4. Inflatable Rodents and Mock Funeral Processions

What if a union pickets with a banner that a building is “full of rats?” If the structure is privately owned, and the government agency only rents space, the message can have a negative impact on the marketability of vacant office space. The message also adversely impacts other occupants in the building or center.

A “rat” is also an employer who does not pay fair wages. But the common meaning of rodent-infested building is likely to be assumed by the public. The Ninth Circuit enjoined a union banner with that message in [San Antonio Comm. Hosp. v. So. Cal. Carpenters](#), #96-56124, 115 F.3d 685, 1997 U.S. App. Lexis 13012 (9th Cir.).



Instead of a banner, it might be a very large inflatable rat (or skunk).

The NLRB has yet to decide the legality of giant rats. It previously affirmed a holding by an Administrative Law Judge who concluded a union-erected rat was an unfair labor practice, but it did not reach the rat issue in the appeal. [Sheet Metal Workers' Intern. and Brandon Medical Center](#), 2004 NLRB Lexis 688, at \*13-15 (Dec. 7, 2004), *aff'd on other grounds*, 346 N.L.R.B. No. 22 (Jan. 9, 2006).

A three-judge appellate court in New Jersey upheld the assessment of a fine and costs against a union official that erected a ten-foot inflatable rat on the sidewalk, in front of the premises that the union was seeking to organize. The rat violated a local ordinance against banners, inflatable balloons and other signage.

The appellate panel concluded that the ordinance was not preempted by the National Labor Relations Act, did not violate the First Amendment, was not unconstitutionally vague, was a content-neutral restriction, and was not selectively enforced against labor unions. One judge dissented on the content holding, worried that the ordinance exempted commercial grand openings and therefore favored business interests. [New Jersey v. DeAngelo](#), # A-4229-05T3, 2007 N.J. Super. Lexis 304 (App. Div.).

Under the NLRA, it is permissible to picket the offices or plant of the employer in a labor dispute. It is not lawful to picket a secondary site. When the sheet metal workers placed a giant rat in front of a hospital, it was unlawful picketing. The picketing was not conducted by hospital workers or their unions, but by a union that sought bargaining rights with a contractor that contractually provided work on a hospital project.



In the Sheet Metal Workers case, union members also held a mock funeral. As noted in the opinion, “They carried a sheet metal coffin, fitted with handles and covered with contact paper so that it appeared to be wooden, in front of the Grim Reaper...”

Hospital employees, patients and their families are not happy to see coffins or to hear funeral music. This also constituted improper “picketing” because it was conducted at a secondary location -- and therefore was unlawful.

## **5. Location of the Picket Line: “Private Sidewalks”**

Union picketing in front of the employer’s place of business is a protected activity. In Las Vegas, casino management requested that the police issue trespass citations to picketers, because the front sidewalk is privately owned.

The union filed an Unfair Labor Practice charge. The NLRB held that a casino’s sidewalk “constitutes a public forum subject to the protections of the First

Amendment.” [Venetian Casino Resort](#), #28-CA-16000, 345 NLRB #82, 2005 NLRB Lexis 510 (Sept. 30, 2005) citing [Venetian Casino v. Local Board](#), #00-15136, 257 F.3d 937 (9th Cir. 2001).

## **6. Picketing in Support of an Unlawful Work Stoppage**

When an Illinois city council declined to approve wage increases, the firefighters’ union reduced the staffing of fire stations to half of normal and commenced informational picketing. The trial court enjoined the work stoppage and picketing.

A three-judge appellate panel upheld the strike ban, but found that picketing is lawful if it is not accompanied by an illegal work stoppage.

Informational picketing is a valid method of expression, and unlike a strike, does not pose a threat to public safety, absent an actual interference with governmental functions.

[City of Rockford v. Local 413, IAFF](#), #68-54, 98 Ill. App. 2d 36, 240 N.E.2d 705 (1968).

Ten years later, the Illinois Appellate Court reiterated that public employees may continue “informational” picketing **after** an unlawful work stoppage has ceased - Illinois court rules. [Board of Education v. Danville Education Assn.](#), 376 N.E.2d 430 (Ill.App. 1978).

## **7. The Right to Wear Uniforms While Picketing**

A federal appeals court upheld the claims of black officers who were fired for removing U.S. flag from their uniforms and picketing; [Leonard v. City of Columbus](#), 705 F.2d 1299, reh. en banc denied, 716 F.2d 914 (11th Cir. 1983).

Eventually, the District Court awarded 12 years of back pay for the six litigants.

It should be noted that while employees can picket in uniform while off-duty, when on duty they are not entitled to wear buttons, armbands or other indicia of union support, unless authorized in the bargaining agreement or recognized past practices.

Massachusetts has held that management must bargain with the union before ordering the removal of union buttons from their uniforms, where the officers wore those buttons for many years without adverse consequences. [Sheriff of](#)

[Worcester Co. v. Labor Relations Cmsn.](#), #01-P-1628, 60 Mass. App. Ct. 632, 805 N.E.2d 46, 2004 Mass. App. Lexis 284 (2004).

The Fifth Circuit has distinguished uniformed public safety employees from other public sector workers, and has held that the wearing of a pro union lapel pin by a county hospital worker, in violation of the employer's dress code, was protected speech. [Communications Workers of America v. Ector County Hospital Dist.](#), #03-50230, 2004 U.S. App. Lexis 24768 (5th Cir. 2004).

## **8. Refusal of Other Public Employees to Cross a Picket Line**

In New Hampshire, the state labor board has upheld unfair labor practice charges against two unions that honored striking firefighters' picket lines. [City of Manchester and AFSCME L-298](#), Case #M-0521, Decision 78-045 (NHPERLB 1978).

Is the refusal to cross a picket line also insubordination or neglect of duty? Clearly that would be the case if a law enforcement officer or firefighter neglects an official duty, or disregards a superior's order to cross the line. No public safety cases have been found, raising this issue.

## **9. References**

Common legal and labor relations [abbreviations](#).

[Is a giant Inflatable Rat an Unlawful Secondary Picket Under §8\(b\)\(4\)\(ii\)\(B\) of the N.L.R.A.?](#) by Tzvi Mackson-Landsberg, 28 (3) Cardozo L. Rev. 1519-61 (2006).

### **Notes:**

1. A list of state PERBs is at <http://www.afscme.org/members/11073.cfm>
2. [NLRB v. Weingarten](#), 420 U.S. 251, 95 S.Ct. 959 (1975).

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