A Guide to Reserved Gates in the Construction Industry
I. **Background**

Unfortunately, because reserved gate systems are a creation of labor law, in order to understand how they operate, it is necessary to define some legal terms.

**A. Distinction Between Primary and Secondary Employers.**

1. **The Primary Employer** – The *primary* employer is the employer that some union has a legitimate dispute with – for example, one that pays substandard wages, one that is not signatory to a contract with any union, or, the situation where the union is on strike against the employer because terms for a new contract could not be agreed upon.

2. **A Secondary Employer** – A secondary employer is one that is not directly involved in the union’s dispute with the primary employer. Instead, the union decides to bring pressure on the secondary employer to gain leverage in its dispute with the primary employer, often by forcing the secondary employer to cease doing business with the primary employer.

   **Example:** The union calls a strike against the primary employer because of a breakdown in contract negotiations. Picketing that employer is lawful, because that is the primary employer which the union has a dispute with. However, if the union also decides to picket a supplier to the primary employer, in an attempt to cut off necessary supplies for the operation of the primary employer’s business, the supplier is a secondary employer. Generally, picketing such a secondary employer is unlawful.

When the National Labor Relations Act was first adopted, it did not restrict secondary activity, including secondary boycotts. In 1947, Congress amended the Act to prohibit certain types of secondary activity.

**B. Relationship to Reserved Gate Systems.**

1. **The “Common Situs.”** What does this have to do with reserved gates in the construction industry? Virtually every jobsite in the construction industry will have a number of contractors working at it. Consequently, such a location is known as a “common situs” for legal purposes. The fact that construction industry typically involves work performed at a common situs is central to the use of reserved gates.

   Because any number of separate employers will be working at the same common situs jobsite, it follows that if there is a primary dispute involving one of those contractors, the rest of the contractors will usually have the status of secondary employers. Our labor laws allow a union to picket a primary employer to put pressure on it to settle its dispute with the union. However, those same laws also attempt to avoid having secondary employers becoming entangled in someone else’s labor dispute. A common situs construction project provides the setting for those principals to conflict. Any picketing of the primary employer runs a good chance of affecting secondary employers that happen to be performing work at the same jobsite, because employees of the secondary employers may have the desire to honor that picket line.

2. **Common Situs Rules for Picketing.** Our labor laws have come up with rules dealing with picketing at such a common situs, and those rules are essential to an understanding of how reserved gates work. The National Labor Relations Board has held that a union can picket against a primary employer at a construction site, even though other secondary employers are present, so long as:

   a) The picketing is limited to those times that the primary employer is at the construction site.
b) The picketing is also limited to those times that the primary employer is engaged in its normal business at the construction site (i.e., an electrical contractor performing electrical work).

c) The picketing is limited to a place that is reasonably close to the location of the primary employer.

d) The picket signs clearly disclose the identity of the primary employer (i.e., “ABC Electrical Contractors unfair by paying less than prevailing rates.”)

3. Effect of Observing These Rules
The NLRB has held that if picketing satisfies all of these tests, it will be presumed to be lawful, even if the picketing has some impact on secondary employers. Conversely, if the picketing fails to meet all of these tests, there is a presumption that the union is attempting to involve neutral secondary employers in the labor dispute, and it may be unlawful.

Note, however, that a union may violate the law even in cases where it complies with all of these standards, but engages in other conduct that suggests that it still wishes to enmesh neutral employers in the dispute. An example would be where the union pickets appropriately, but notifies other union at the jobsite that it will be picketing, and requests other crafts to honor its picket line even if a reserved gate is established.

4. How does this tie in to the use of a reserved gate?
Establishing a reserved gate relates to the requirement that the union conduct its picketing at a place that is reasonably close to the location of the primary employer.

Think of it in this fashion. The construction site itself will likely be private property, and the union generally has no right to enter private property to engage in picketing. If there is no reserved gate established, the union may picket any entrance to the construction site where a primary employer is present, because the union can argue that one entrance is as close to the primary employer as any other.

However, a reserved gate system changes that. Such a system will reserve one gate for the exclusive use of the primary employer. Once that gate is marked and established, in order to satisfy the four-part test, the union must limit its picketing to the gate reserved for the primary employer to satisfy the requirement that it be conducted “reasonably close” to that employer. If the union confines its picketing to the reserved gate, and does not picket the other gates, then the employees of other secondary employers will be able to work without having to cross a picket line.¹

II. Establishment of a Reserved Gate

A. Distinction Between Primary and Secondary Employers.
   1. Establishment. Establishment of a reserved gate is simple. All that is required is:

¹ As will be discussed later, it is critical that everyone at the jobsite use the appropriate gate. Also note that once they enter the appropriate gate, the fact that employees may work shoulder-to-shoulder anywhere on the jobsite is irrelevant. The union must still confine its picketing only to the reserve gate.
a) Have an entrance to the construction site that is separate from other entrances (there need not be any “gate” in the literal sense).
b) Clearly mark that entrance as being for the exclusive use of the primary employer, its employees, material suppliers, and subcontractors.

Example: All subcontractors at a jobsite are signatory, with the exception of the electrical contractor. The union begins to picket the jobsite with signs notifying the public that the electrical subcontractor is paying sub-standard wages. Further assume that there are three entrances to the jobsite. If one of those entrances is reserved and marked for the exclusive use of the electrical contractor, the union must confine its picketing to that gate.

2. Reserved Versus Neutral Gates. Throughout this handbook there will be references to the “reserved” gate, which is the gate set aside for the primary contractor that has the dispute with the union. This handbook will also refer to a “neutral” gate or gates. Those are the gates intended to be used by secondary employers that are not directly involved with the primary contractor’s labor dispute.

B. Suggested Verbiage for Signs Establishing the Reserved Gate. Using the same hypothetical of a non-union electrical contractor, the following wording may be used on a sign establishing the reserved gate:

```plaintext
GATE A

NOTICE: THIS GATE IS RESERVED FOR THE SEPARATE AND EXCLUSIVE USE OF ABC ELECTRICAL CONTRACTORS, INC., ITS EMPLOYEES, MATERIAL SUPPLIERS, AND SUBCONTRACTORS.

ALL OTHER INDIVIDUALS MUST USE THE GATE THAT HAS BEEN RESERVED FOR THEIR SEPARATE AND EXCLUSIVE USE.
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1. Note that consistent with this verbiage, companies making deliveries to the primary employer, or subcontractors to the primary employer, must use the primary employer’s gate. That is because under the law, the union is entitled to encourage the employees of those delivery companies, and employees of subcontractors to the primary employer, to honor the union’s picket line. *You cannot abridge the union’s right to do so by attempting to have suppliers of the primary employer or its subcontractors use a neutral gate.*

    Case law also suggests that simply omitting the word “suppliers” from the sign at the primary gate may invalidate it. Also note that in deciding which gate a supplier must use, actual ownership of the materials being delivered is not determinative. Rather, it is which employer that will use the materials. Therefore, the fact that title to the materials will not transfer to the primary employer until actually delivered to the jobsite is irrelevant.

2. Suggested verbiage for signs establishing neutral gates. Although there is technically no technical requirement that a sign actually be used to establish a neutral gate, doing so will avoid confusion
and likely make the system work better. Therefore, at the same time that the reserved gate is established for our hypothetical electrical contractor, a gate (or gates) should also be established for the other contractors at the jobsite. It should state:

3. **Avoid shortcuts!** Although it has sometimes worked, you should avoid simply establishing one gate as “union,” and another gate as “non-union.” To avoid any argument that the union’s picketing of the neutral gate is lawful, the reserved gate should identify the primary employer or employees by name, and that gate should be reserved for its employees, material suppliers, and subcontractors. In like respect, any neutral gate should be reserved for named employers, their employees, material suppliers, and subcontractors.

C. **Size of Sign.**
   1. **No Specific Size Needed.** There is no specific legal requirement establishing the size of the sign marking the reserve gate. However, it obviously must be large enough, with wording that is sufficiently legible, to put everyone on notice who is to use what gate.
   2. **Practical Solution.** If a gate must be established quickly, many contractors have simply divided a 4 X 8 sheet of plywood in half, using one half for the reserve gate and the other half for the neutral gate. The text should be large enough so that it can be read from a distance of 20 to 30 feet.

D. **Written Notice of the Establishment of the Reserved Gate**
   1. **Notice to Picketing Union.** In order to insist that the union picket only the proper gate, it is essential that the union be given written notice that the reserved gate has been established and its location, prior to the system becoming effective. A sample letter for notification to the union is found as an attachment to this handbook.
   2. **Notification to Other Jobsite Unions.** Although there is no legal requirement to do so, in some cases, it may also be helpful for the appropriate contractor to notify other jobsite unions that a reserved gate system has been established, and that as a consequence, members of those unions will be expected to report to work as scheduled.

E. **Timing of the Establishment of a Reserve Gate.**
   1. **No Requirement to Wait for Picketing.** Reserved gates may be established prior to any dispute. There is no legal requirement to wait until a labor dispute emerges before a reserve gate is established. For example, a reserved gate system could be in place even before any employees report to work at a new jobsite.
   2. **Establishment is a judgment call.** However, even though a reserved gate may be established at any time, some judgment should be employed. For example, if a non-union subcontractor will only be at the jobsite for a very limited period of time, it may not be the best strategy to establish a reserved gate beforehand, announcing to the world that the contractor will be present. Doing so obviously may invite picketing that might never have occurred, but for notice of the reserved gate system.

In contrast, if there has been a longstanding dispute between the union and one particular contractor that will be at the jobsite for an extended period of time, it may be anticipated that picketing will occur, and there may be no point in waiting to establish such a system.
III. **Gate Contamination**

A reserved gate system will be valid only if the primary employer uses the appropriate gate. The system will quickly become invalid, and picketing may be expanded to neutral gates, if those gates become “contaminated.”

**A. Contamination.** A neutral gate will become contaminated if the primary employer, its materials suppliers, employees, or subcontractors use a gate other than what was established for the primary employer. (A neutral gate).

**Example:** To use our hypothetical non-union electrical contractor situation, if employees of ABC Electrical Contractors go through a gate that has been reserved for the neutral employers, that gate will become contaminated, and it would then be lawful for the IBEW to picket the neutral gates, in addition to the reserved gate.

**Note, however, that the reverse is not true.** If employees of a neutral employer choose to go through the reserved primary gate, that will not invalidate the reserve gate system. It is only where the primary employer goes through a neutral gate that the system may become invalid.

**B. Policing of Gate.** Because of the possibility of contamination, it is critically important that everyone at the jobsite use the appropriate gate. Otherwise, you may find out that the gates have been contaminated when an unfair labor practice charge is filed with the NLRB objecting to the picketing, and the union asserts that no one is paying any attention to using the appropriate gate.

Consequently, when a reserve gate system is established, make certain

1. That the signage at each gate is absolutely clear as to who is to use that entrance.

2. That all contractors at the jobsite are notified of the reserved gate system in writing, and are given specific instructions regarding which gate they are to use.

3. At least in the initial stages of establishing the reserved gate system, consider policing them by having individuals stationed at the neutral gates to make certain that no one involved with the primary employer attempts to go through a neutral gate. People attempting to go through the wrong gate should be turned away, and instructed to use the appropriate gate.

**C. Reestablishment of a Contaminated Gate.** The law gives contractors some ability to reestablish a reserved gate system that has become contaminated. Reestablishment may be accomplished by:

1. Again directing all employers to use the appropriate gate, along with their employees, material suppliers, and subcontractors.

2. Taking additional steps to ensure that they comply with that directive, such as policing the gates.

3. Notifying the union, in writing, that the gate may have been contaminated, but that it has been reestablished and that the union is expected to confine its picketing activity to the primary gate in the future. (Sample correspondence advising the union is attached to this handbook).
IV. Special Logistical Issues

A. The Construction Site with Only One Public Entrance. Occasionally, you will encounter a construction site that literally has only one public entrance to the entire facility. At first blush, this creates a challenge for someone attempting to establish a reserved gate system.

1. **Internal Reserved Gate.** In circumstances where there is only one entrance to a construction site, the NLRB approved an arrangement where “gates” consisted of nothing more than signs designating particular contractors that were established within the construction site. Therefore, everyone would enter the site through the one public entrance, but would then proceed to the area adjacent to the sign established for their particular use.

2. **Trespass Issues.** For such an arrangement to be valid, the union must not only be advised of the reserved gate system, but must also be given assurances that it may enter the construction site (which is typically private property) to picket adjacent to the primary gate without being charged with trespassing. (Note that this will require a coordination of efforts with the construction user and the general contractor or contract manager.)

3. **Limitations.** Such a system should be used sparingly. Although the NLRB approved such an arrangement, it noted that similar situations will be judged on a case-by-case basis. This unusual arrangement was approved by the Board based upon evidence that another gate could not feasibly be established and that there was no showing that the employers had acted in bad faith by confining picketing in this matter.

B. **Reserved Gates with Limited Public Visibility.**

1. **Efforts to “Hide” the Picketing.** The case law suggests that if an employer deliberately establishes a reserved gate at a remote location to deliberately shield the picketing activity from the public eye,
such a system is subject to challenge. However, the case law also establishes that if there are two entrances to a facility, that union is not entitled, as a matter of law, to the entrance with the highest visibility so long as the employer is acting in good faith.

2. Use Common Sense. The lesson to be learned from these conflicting principles is that the primary objective of a reserved gate system is to quickly get the jobsite productive once again. Attempts to deliberately restrict the union’s picketing to a reserve gate that is far from the public eye when other alternatives are available, should be resisted. The objective should be to get work at the jobsite back on track, rather than hiding the picketing from view.

C. Scheduling of Work at the Jobsite as an Alternative to a Reserved Gate.

1. The Four-Part Test. Recall that one of the standards used by the NLRB in deciding whether picketing is lawful is also whether the picketing is limited to those times when the primary employer was at the jobsite. That is a factor in addition to the location of the picketing. This principle may allow contractors to also consider work scheduling to accomplish the same end as a reserved gate. In cases where establishing different gates is difficult—i.e., single entrance construction sites.

Example: If one non-union contractor will be at the jobsite, but is able to perform its work evenings when no other building trades will be at the site, that contractor’s work could be scheduled during evening hours so that any picketing would not interfere with the other building trades.

2. Notice to Union. In order to be valid, the picketing union must have actual notice of the exact times that the primary contractor will be at the jobsite, so that the union will know when lawful picketing may occur.

Consequently, the picketing union should be notified in writing of those times that the primary contractor will be at the site, and the union should also be advised that if it pickets outside of those times, appropriate unfair labor practice charges will be filed.

3. De Minimis Exceptions to the Rule Concerning “Presence” at the Jobsite. Temporary absences of the primary employer generally do not count. If the primary employer’s employees leave the jobsite briefly for lunch breaks, etc., the union is still entitled to picket the jobsite, even though the primary employer is technically momentarily absent. It is only extended absences of the primary employer that will end the union’s right to picket the jobsite.

It is also essential that the union have actual notice when the primary employer will be present so that it may confine its picketing to lawful times.

V. Remedies if the Union Pickets a Neutral Gate

A reserved gate system will be valid only if the primary employer uses the appropriate gate. The system will quickly become invalid, and picketing may be expanded to neutral gates, if those gates become “contaminated.”

A. Filing an unfair labor practice charge with the NLRB.

1. If the union pickets a neutral gate after a reserved gate system has been established, a charge should be immediately filed with the appropriate region of the NLRB. (A sample charge is attached to this handbook). The charge should allege a violation of section 8(b)(4). As soon as possible after
the charge has been filed, the region should also be furnished with:

a) *Pictures* of the picketing, clearly reflecting the *location of the picketing*, as well as the *language appearing on the picket signs*.

b) Pictures establishing the wording used on the *signs* posted near the primary and neutral gates.

c) Schematic diagrams or actual plat drawings of the property reflecting entrances to the site, and the location of the gates.

d) Copies of correspondence to the Unions advising of the establishment of the reserved gate.

e) Notarized Affidavits of witnesses reflecting evidence in support of the unfair labor practice charge, such as admissions of unlawful intent by the offending union, i.e., an acknowledgement that the Union wishes to shut down the entire jobsite, or statements reflecting that it has made appeals to other crafts to refuse to work, as well as the impact that the picketing has had upon neutral employers.

B. **Injunctive Relief from the Court System**

1. It is important to understand that generally, *only the NLRB can obtain injunctive relief* against unlawful picketing at the neutral gate. Usually, a contractor cannot go to court to do so. This illustrates why it is extremely important to file an unfair labor practice charge immediately when unlawful picketing occurs.

2. Under the law, the NLRB must initiate an action for injunctive relief if there is “reasonable cause” to believe that the law has been violated, and that the unlawful acts will continue unless enjoined. Even though the same law says the NLRB must give priority to investigating an unfair labor practice charge involving the picketing of a neutral gate, there may still be a significant time delay in ending the unlawful activities.

C. **Damage Action Against the Offending Union.**

1. Section 303 of the Labor Management Relations Act creates a cause of action for damages for any person that is injured by union conduct that violates Section 8(b)(4) of the National Labor Relations Act. The contractor that has been injured by unlawful picketing may threaten or actually initiate such a lawsuit at the same time that it files an unfair labor practice charge with the NLRB.

2. Such damages are recoverable against the union that is engaged in the unlawful picketing, and can result in the recovery of lost profits, etc.

**Note:** The actual recovery of damages may be a long shot, as many local unions are not financially well-off. However, oftentimes, the threat of such a lawsuit may bring an end to the unlawful picketing.

D. **Legal Actions Against Other Unions at the Jobsite.**

1. The foregoing remedies are against the union that is engaged in the unlawful picketing. However, it is also possible there may be remedies against other unions at the jobsite, if, for example, they refuse to man the project because of picketing at the reserved gate.
a) **Suit for Violation of No-Strike Provision.** For example, in our hypothetical, if the IBEW unlawfully pickets a neutral gate established for employers other than the electrical contractors, and the unions representing those other employer’s employees advise their members to honor the picket line, such conduct may be in violation of a *no-strike provision* in that union’s collective bargaining agreement.

In such a circumstance, one of the other contractors might threaten or actually initiate a damage action against the union that it is signatory with, alleging that it has violated its no-strike commitment by encouraging its member to honor the picket line. Generally, this remedy is available only if the union has actually directed or encouraged members to cease working because of the picket line.

This remedy is also in addition to injunctive relief that may be sought by the NLRB. Note that depending upon the language of the underlying collective bargaining agreement, the contractor initiating such an action may be confronted with a union claim that the contractor must use the grievance arbitration procedures of the contract before initiating such an action.

b) **Disciplinary Action.** Honoring an unlawful picket line is unprotected activity. If employees individually choose to honor an unlawful picket line at a neutral gate, or a lawful picket line at a reserved gate, they may be subject to disciplinary action, including discharge by the employer.

Note that if the union takes the discharge of such an employee to arbitration, claiming that the contract permitted the employee to honor such a picket line, by doing so, the union violates 8(b)(4)(ii)(A) of the Act.

c) **Impact of Contract Language.** A union *cannot* lawfully negotiate a contract clause that permits employees of neutral contractors to refuse to work because of the presence of a picket line at a reserved gate. Such a provision is illegal and a “hot cargo” clause prohibited by Section 8(e) of the National Labor Relations Act.

d) **Threats of Union Fines.** A union also cannot lawfully threaten to *fine* employees of a neutral contractor for working on a construction site where a reserved gate is being picketed. If a union threatens to do so, or actually imposes such fines, it violates 8(b)(4)(ii)(A) and 8(b)(4)(i)(B) of the Act.

e) **Grievance Against Union for Failing to Man the Job.** Although they are of questionable utility in bringing about a speedy resolution of jobsite manning issues, grievances are a potential remedy where the union has violated a contractual obligation to man the project.

### VI. Limitations of Reserved Gates – When They Won’t Work

Reserved gates may be a useful tool in keeping a jobsite manned when there is a labor dispute with one contractor, but there are limits as to when they can be used.

A. **Reserved Gates Cannot Be Used to Attempt to Avoid Your Own Labor Dispute.**

1. If a contractor is signatory to two unions and one of them goes on strike, the contractor cannot establish a “reserved gate” for the striking group of employees, and demand that their union picket
only that gate. The reason is that an employer cannot use a reserved gate system to attempt to isolate itself from its own labor dispute. It will always be the primary employer in such a situation.

**Example:** A contractor is signatory to an agreement with the sheet metal workers and plumbers. The plumbers go on strike at contract expiration. The contractor cannot establish a reserved gate system insisting that plumbers picket only a gate reserved for employees represented by the United Association. Even if the UA were to comply with the contractor’s request, the sheet metal workers may honor the UA picket line, unless the sheet metal workers had specifically waived its right to do so by contract language, waiving its right to engage in a sympathy strike.

**B. Ally Doctrine**

1. **Struck Work.** On a related note, reserved gate systems may be used to limit labor disputes only for a truly *neutral* employer. A contractor can lose its status as a neutral employer—and become an “ally” of the struck employer—if it performs what is known as “struck work.” Struck work is work that would have been performed by employees of another employer, but for the strike, with the result that it then becomes performed by the purportedly neutral employer.

   **Example:** The plumbers go on strike against a mechanical contractor when negotiations break down. A reserved gate is established for the mechanical contractor, and a neutral gate is established for the sheet metal contractor, as well as other uninvolved crafts. In an effort to get the job done, the sheet metal contractor takes over some of the installation of work that would have been done by the mechanical contractor, but for the strike.

   a) The plumbers union could now legally picket the neutral gate intended to be used by the sheet metal contractor, because the sheet metal contractor has voluntarily enmeshed itself in the labor dispute of the mechanical. Note, however, that if this became an issue, an additional reserved gate could be established for the sheet metal contractor, away from the other uninvolved crafts.